STIC Scientific and Technical Information Center	Dialog®

Core FT1:

- Business & Industry , File 9 (1994 - present)
- ABI/INFORM®, File 15 (1971 - present)
- Gale Group PROMT®, File 16 (1990 - present)
- Gale Group PROMT®, File 160 (1972-1989)
- Gale Group Trade & Industry Database , File 148 (1976 - present)
- Gale Group Computer Database , File 275 (full-text 1/1988 - present)
- Business Wire, File 610 (Mar 1999 - present)
- Business Wire, File 810 (1986 - February 1999)

Core FT2:

- Dialog Global Reporter, File 20 (May 1997 - present)
- The McGraw-Hill Companies Publications Online, File 624 (1985 - present)
- Gale Group New Product Announcements/Plus® (NPA/Plus, File 621 (1985 - present)
- Gale Group Newsletter Database , File 636 (1988 - present)
- PR Newswire, File 613 (May 1999 - present)
- San Jose Mercury News, File 634 (Jun 1985 - present)
- PR Newswire, File 813 (May 1987 - May 1999)

Sub35FT:

- McClatchy-Tribune Information Service, File 608 (Jan 1989 - present)
- American Banker Financial Publications, File 625 (1981 - June 2008)
- Banking Information Source, File 268 full-text (1994 - present)
- Bond Buyer Full Text, File 626 (November 1981 - April 2008)
- DIALOG Finance & Banking Newsletters, File 267 (1996 - present)

Set#	Query
L1	SEGREGATED WITH ACCOUNT
L2	sub adj2 account$3
L3	segrgat$2 with account$3

L4	segregat$2 with account$3
L5	owner ownership
L6	COMPAN$3
L7	organization$2
L8	enterprise enterprize
L9	nonvoting with stock
L10	((investment with discretion) with (gains proceeds profit$1)) with share$1
L11	l9 same l6 same l6 same l4
L12	((investment with discretion) SAME (gains proceeds profit$1)) SAME share$1

66/9/1 (Item 1 from file: 148)
15039648 **Supplier Number:** 92425602 (THIS IS THE FULL TEXT)
PPR - $.0375 September Dividend.

Business Wire , 0299
Oct 3 , 2002
Language: English
Record Type: Fulltext
Word Count: 468 **Line Count:** 00049

Text:

Business Editors

PHOENIX--(BUSINESS WIRE)--Oct. 3, 2002
ING Prime Rate Trust (NYSE: PPR), a diversified closed-end management investment company listed on the New York Stock Exchange, declared 3.75 cents per **share** monthly dividend on September 30, 2002 for the 30 days of September, payable on October 22, 2002 to shareholders of record on October 10, 2002. This represents the 173rd consecutive monthly dividend since the Trust's inception in May 1988.
The following are annualized distribution rate calculations based on the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
September 30, 2002	$ .0375	6.75%	7.73%
August 30, 2002	$ .0385	6.65%	7.66%
July 31, 2002	$ .0375	6.38%	7.56%
June 28, 2002	$ .035	6.00%	6.76%
May 31, 2002	$ .0365	5.93%	6.42%
April 30, 2002	$ .0365	6.08%	6.57%
March 28, 2002	$ .0385	6.24%	6.57%
February 28, 2002	$ .0385	6.97%	7.41%

January 31, 2002	$ .041	6.61%	7.08%
December 21, 2001	$ .042	6.82%	7.45%
November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%

ING Prime Rate Trust was the first fund to invest in a portfolio of floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of capital.

The Trust is managed by ING Investments, LLC, and distributed by ING Funds distributor, Inc. The Trust and distributor are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE: ING), one of the world's leading financial services companies with operations in over 65 countries. The Trust's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact ING Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at Stacey.parker@ingfunds.com.

Industry Codes/Names: BUS Business, General; BUSN Any type of business
File Segment: NW File 649

66/9/2 (Item 2 from file: 148)
0020133618 **Supplier Number:** 91198178 (THIS IS THE FULL TEXT)

Anti-Money Laundering Policies and Procedures.(USA PATRIOT Act)

Mondaq Business Briefing , NA
Sept 9 , 2002
Language: English
Record Type: Fulltext
Word Count: 2438 **Line Count:** 00209

Text:

On October 26, 2001, the USA PATRIOT Act (the "USA PATRIOT Act")1 was enacted into law, aimed at giving the government new powers in the war on terrorism. The USA PATRIOT Act also imposed significant new anti-money laundering requirements on all financial institutions. The requirements for

financial institutions went into effect on April 24, 2002. (Schulte Roth & Zabel LLP ("SRZ")) has been closely monitoring the impact of this legislation and related proposed Treasury regulations on the private investment fund industry. To date, no definitive guidelines or procedures have been recommended by any governmental body or authority that specifically relate to such funds. However, in light of the USA PATRIOT Act, private investment funds would be well advised to adopt policies and procedures that are reasonably designed to ensure compliance with its provisions.

Set forth below is a summary of our proposed policies and general recommendations:

1. We recommend that funds update Investor representations in domestic and offshore subscription documents, as needed. Several additional representations should be included in the subscription documents by which the Investor represents that: (i) its sources of investment funds are not derived from criminal activities; (ii) it is not a "senior foreign political figure"; (iii) it is not on the OFAC 2 -prohibited lists or prohibited by an OFAC sanctions program; and (iv) it is not a "foreign shell bank" and does not transact with a "foreign shell bank." If a prospective Investor cannot make these representations, a fund would not accept its subscription.

2. For existing Investors in domestic and offshore funds, we have prepared a sample letter to investors, attached hereto as Exhibit A. This letter can be sent to existing investors, with the expectation that such investors will return the requested Certification to the General Partner/Managing Member/Administrator by a specified date. If an existing investor does not respond by the specified date, we advise mailing a second letter (via overnight courier or certified, return receipt requested) and giving the investor an additional period of time to return the Certification. If no response is received by the second date, we believe that the fund's management should promptly determine what actions should be taken with respect to such investor (e.g., mandatory withdrawal of interests or redemption of **shares**, schedule meeting with investor). In addition, the fund may consider performing its own OFAC due diligence with respect to existing investors.

3. Certain documentation will be requested from all new investors as part of the "Know Your Investor" initiative. Depending upon the type of investor, such documentation might be in the form of a passport or driver's license for an investor that is a natural person, a certificate of good standing for an investor that is an entity, and/or a letter of reference from a reputable banking institution or brokerage firm for investors based in certain countries. With respect to a fund's existing investors, the fund may consider conducting additional "Know Your Investor" due diligence.

You will notice that the materials contemplate gathering different documentation for different categories of investors. Because the categories that we have used are broad, the type of documentation requested will not always be appropriate for a particular investor. For example, a fund of funds investor is expected to provide a representation that it has anti-money laundering procedures in place. However, a family that has organized a "fund of funds" for family members, in all likelihood, will not have such procedures and could not make the representation. As another example, it may be more appropriate to obtain an annual report from an endowment for a major university or pension plan rather than the information regarding the composition of private entities and trusts that the materials request. In these and other situations, the fund should exercise its discretion and obtain such backup information for your records as is sufficient to make you reasonably comfortable regarding the investor and its source of funds.

4. We have had contact with several service companies that are in

the business of managing and checking a central database of Investor names against the OFAC-prohibited lists. Most of the larger U.S. financial institutions already subscribe to such services to screen their accountholder names. For an annual fee and a nominal charge per name, such services would alleviate the burden of having to constantly monitor the OFAC website. However, consideration should also be given to investor privacy concerns (e.g., a service company could be subpoenaed to disclose the contents of its database). SRZ is available to discuss these services with you further.

5. Section 352 of the USA PATRIOT Act required that all financial institutions have an anti-money laundering compliance program in place as of April 24, 2002 with the following four elements: (i) the development of internal policies, procedures and controls; (ii) the designation of a compliance officer; (iii) an on-going employee training program; and (iv) an independent audit function to test programs. SRZ has prepared and made available to our clients a model anti-money laundering compliance manual developed for hedge funds. We believe that the proposed manual satisfies any compliance obligations applicable to our hedge fund clients. However, this should not be viewed as a "one size fits all" document. The procedures should be adapted to meet the specific needs and capabilities of your organization.

SRZ believes that these procedures reflect the minimum standards necessary to be consistent with industry practice and the spirit of the USA PATRIOT Act. You may, however, consider implementing certain additional measures (e.g., seeking independent verification of investor identity and source of funds under all circumstances), to provide an additional level of comfort regarding your investor base. As further Congressional discussions are held and more Treasury guidance is released within the next six to 12 months, we may advise that different measures than those set forth in the documents below be used. SRZ will update its clients on developments, including further suggested revisions to offering materials, if necessary.

We recognize that these new policies and procedures may, at first, seem burdensome and difficult to implement. We are available to meet with you and assist you and your organization in putting these policies into effect.

1 The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 (2001).

2 The U.S. Treasury Department's Office of Foreign Assets Control.

FORM LETTER TO EXISTING INVESTORS RE: OFAC/ANTI-MONEY LAUNDERING/SHELL BANK REPRESENTATIONS (FUND LETTERHEAD)

Dear Investor:

In order to comply with recent Federal legislation and executive orders addressing money laundering and anti-terrorist issues, we are asking each of our existing Investors to certify to the attached representations by signing the attached Certification and mailing it back to the (General Partner)(Managing Member)(Administrator). The Certification should be received by the Fund by (Give appropriate notice period (e.g., 2-4 weeks)). If you can not certify to any of the attached representations or have any questions regarding this letter, please contact (Insert name) at (Insert telephone number).

Please note that discussions currently being held in the U.S. Congress and the U.S. Treasury Department may require us to seek additional information from you in the future.

We appreciate your cooperation in this matter.

Very truly yours,

____

Name:

Title:

CERTIFICATION OF INVESTOR OF (NAME OF FUND)

I hereby certify that I have read and understand the letter dated (Insert Date) from the Fund and that the attached anti-money

laundering/OFAC representations contained therein are true and correct.

If an Individual:

____

If an Entity:

____

Print Name

____

Print Name of Entity

By:________________________________

Signature

Name:

Title:

Date:_______________, 2002

- -

FOR U.S. INVESTORS ONLY

ACKNOWLEDGMENT

STATE OF _____________)

) ss:

COUNTY OF___________)

On this ____ day of _________, ___, before me personally appeared _______________________, to me known and known to me to be the individual who executed the foregoing Certification in the capacity therein indicated, who acknowledged that he or she, being authorized to do so, executed the foregoing instrument for the purposes therein contained and in the capacity therein indicated as his or her own free act and deed.

____

Notary Public

My Commission Expires:

____

Please mail this Acknowledgment to the (General Partner)(Managing Member)(Administrator) at (Insert address, Attn: ______) by (Insert date as indicated on cover letter).

REPRESENTATIONS AND WARRANTIES

(A) Investors should check the OFAC website at http://www.treas.gov/ofac before making the following representations.

The Investor represents that the amounts contributed by it to the Fund were not and are not directly or indirectly derived from activities that may contravene federal, state or international laws and regulations, including anti-money laundering laws and regulations.

Federal regulations and Executive Orders administered by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") prohibit, among other things, the engagement in transactions with, and the provision of services to, certain foreign countries, territories, entities and individuals.1 The lists of OFAC prohibited countries, territories, persons and entities can be found on the OFAC website at . In addition, the programs administered by OFAC ("OFAC Programs") prohibit dealing with individuals or entities in certain countries regardless of whether such individuals or entities appear on the OFAC lists.

The Investor hereby represents and warrants that, to the best of its knowledge, neither of:

(i) the Investor;

(ii) any person controlling or controlled by the Investor;

(iii) if the Investor is a privately held entity, any person having a beneficial interest in the Investor; or

(iv) any person for whom the Investor is acting as agent or nominee in connection with this investment is a country, territory, individual or entity named on an OFAC list, nor is a person or entity prohibited under the OFAC Programs.

If an existing Investor can not make these representations, the Fund may require the withdrawal of interests or redemption of **shares**.

The Investor agrees promptly to notify the Fund should the Investor become aware of any change in the information set forth in these representations. The Investor is advised that, by law, the Fund may be required to disclose the Investor's identity to OFAC.

(B) The Investor represents and warrants that, to the best of its knowledge, none of:

(i) the Investor;

(ii) any person controlling or controlled by the Investor;

(iii) if the Investor is a privately held entity, any person having a beneficial interest in the Investor; or

(iv) any person for whom the Investor is acting as agent or nominee in connection with this investment is a senior foreign political figure,2 any immediate family member3 or close associate4 of a senior foreign political figure as such terms are defined in the footnotes below.

(C) If the Investor is a non-U.S. banking institution (a "Foreign Bank") or if the Investor receives deposits from, makes payments on behalf of, or handles other financial transactions related to a Foreign Bank, the Investor represents and warrants to the Fund that:

(1) the Foreign Bank has a fixed address, other than solely an electronic address, in a country in which the Foreign Bank is authorized to conduct banking activities;

(2) the Foreign Bank employs one or more individuals on a full-time basis;

(3) the Foreign Bank maintains operating records related to its banking activities;

(4) the Foreign Bank is subject to inspection by the banking authority that licensed the Foreign Bank to conduct banking activities; and

(5) the Foreign Bank does not provide banking services to any other Foreign Bank that does not have a physical presence in any country and that is not a regulated affiliate.

(D) The Investor understands and agrees that any withdrawal or redemption **proceeds** paid to it will be paid to the same account from which the Investor's **investment** in the Fund was originally remitted, unless the (General Partner)(**Investment** Manager), in its sole **discretion**, agrees otherwise.

SAMPLE FORM LETTER RE: SECOND NOTICE TO EXISTING INVESTORS

(FUND LETTERHEAD)

Dear Investor:

Reference is made to the letter dated ______________, (Insert Date) a copy of which is attached hereto. We have not heard from you. This letter is a reminder to please sign the Certification and return it to us as soon as possible.

In the event that we do not receive your Certification by ________________, Insert Date we may have to (withdraw)(redeem) your (interests)(**shares**) in the Fund pursuant to the terms of the Fund's governing documents.

Please contact __________________ (Insert Name) at ________________ (Insert Telephone No.) if you have any questions. We look forward to hearing from you soon.

Very truly yours,

____

Name:

Title:

1 These individuals include specially designated nationals, specially designated narcotics traffickers and other parties subject to OFAC sanctions and embargo programs.

2 A "senior foreign political figure" is defined as a senior official in the executive, legislative, administrative, military or judicial branches of a non-U.S. government (whether elected or not), a senior official of a major non-U.S. political party, or a senior executive of a non-U.S. government-owned corporation. In addition, a "senior foreign political figure" includes any corporation, business or other entity that

has been formed by, or for the benefit of, a senior foreign political figure.

3 "Immediate family" of a senior foreign political figure typically includes the figure's parents, siblings, spouse, children and in-laws.

4 A "close associate" of a senior foreign political figure is a person who is widely and publicly known to maintain an unusually close relationship with the senior foreign political figure, and includes a person who is in a position to conduct substantial U.S. and non-U.S. financial transactions on behalf of the senior foreign political figure.

The content of this article does not constitute legal advice and should not be relied on in that way. Specific advice should be sought about your specific circumstances.

Betty Santangelo Esq
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NY 10022
UNITED STATES
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URL: www.srz.com

Industry Codes/Names: INTL Business, international
Descriptors: Money laundering--Prevention; Financial services industry--Laws, regulations and rules
Geographic Codes: 1USA United States
Product/Industry Names: 6000000 (Financial Services); 9108600 (Business Aid & Regulation NEC)
NAICS Codes: 52 Finance and Insurance; 92615 Regulation, Licensing, and Inspection of Miscellaneous Commercial Sectors
Statute Name: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001

66/9/3 (Item 3 from file: 148)
14942082 **Supplier Number:** 91059746 (THIS IS THE FULL TEXT)
PPR -- $.0385 August Dividend.

Business Wire , 0413
Sept 4 , 2002
Language: English
Record Type: Fulltext
Word Count: 466 **Line Count:** 00051

Text:

Business Editors

PHOENIX--(BUSINESS WIRE)--Sept. 4, 2002

ING Prime Rate Trust (NYSE: PPR), a diversified closed-end management investment company listed on the New York Stock Exchange,

declared 3.85 cents per **share** monthly dividend on August 30, 2002 for the 31 days of August, payable on September 23, 2002 to shareholders of record on September 10, 2002. This represents the 172nd consecutive monthly dividend since the Trust's inception in May 1988.

The following are annualized distribution rate calculations based on the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
August 30, 2002	$ .0385	6.65%	7.66%
July 31, 2002	$ .0375	6.38%	7.56%
June 28, 2002	$ .035	6.00%	6.76%
May 31, 2002	$ .0365	5.93%	6.42%
April 30, 2002	$ .0365	6.08%	6.57%
March 28, 2002	$ .0385	6.24%	6.57%
February 28, 2002	$ .0385	6.97%	7.41%
January 31, 2002	$ .041	6.61%	7.08%
December 21, 2001	$ .042	6.82%	7.45%
November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%
September 30, 2001	$ .047	7.61%	8.25%

ING Prime Rate Trust was the first fund to invest in a portfolio of floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of capital.

The Trust is managed by ING Investments, LLC, and distributed by ING Funds distributor, Inc. The Trust and distributor are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE: ING), one of the world's leading financial services companies with operations in over 65 countries. The Trust's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact ING Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at Stacey.parker@ingfunds.com

Industry Codes/Names: BUS Business, General; BUSN Any type of business
File Segment: NW File 649

66/9/4 (Item 4 from file: 9)
02929129 Supplier Number: 93306553

The Sarbanes-Oxley Act of 2002 effects sweeping changes to the U.S. federal securities laws.

Strategic Investor Relations , v 2 , n 3 , p 11
September 2002
Document Type: Journal **ISSN:** 1533-936X (United States)
Language: English **Record Type:** Fulltext
Word Count: 5636

TEXT:

Signed into law by President Bush on July 30, 2002, the Sarbanes-Oxley Act of 2002 (the Act) presents what may be among the most sweeping set of changes to U.S. federal securities laws since the New Deal. Designed to address widespread outrage and waning investor confidence resulting from a series of financial meltdowns, earnings restatements, and other corporate and accounting abuses, the Act is in many ways unprecedented. For example, in addition to regulating disclosure and securities trading, the traditional jurisdiction of U.S. federal securities laws, the Act also addresses matters of substantive corporate governance and executive fiduciary responsibility, such as loans to officers and directors, management oversight, director due diligence, and executive compensation, as well as professional responsibilities of external auditors and attorneys, areas traditionally left to the states and self-regulatory organizations (SROs) such as the NYSE, AMEX, and Nasdaq. The Act is complex, with over 70 sections, and will present numerous challenges to corporate executives, financial officers, and professional service providers. What's more, given the pace with which the Act was pushed through the conference committee process and adopted by Congress, various inconsistencies and ambiguities already have emerged and will continue to do so. The Act certainly will receive the prompt attention of the Securities and Exchange Commission (SEC) as it promulgates the many regulations required to implement the Act's broad-based mandate.

This article presents a number of key aspects of the Act that we believe are of most immediate concern to corporate executives, directors, and institution investors.

What Concerns Must Be Addressed Immediately? A number of the Act's provisions have immediate or near-immediate effectiveness:

Effective immediately all periodic reports that contain financial statements filed with the SEC must be accompanied by a certification of the CEO and the CFO, referred to as the Section 906 Certification, that the report fully complies with the requirements of the Securities Exchange Act of 1934, as amended (the Exchange Act), and fairly presents, in all material respects, the financial condition and results of operations of the issuer. The Section 906 Certification will be necessary for the next filed periodic report (and was required for the second-quarter Form 10-Q due by August 14th for calendar year companies) and applies to all public companies (including reporting foreign issuers) regardless of size. A signing officer who knowingly or willfully provides a false Section 906 Certification can be subject to fines of up to $5 million or imprisonment for up to 20 years, or both. It remains unclear what the precise language

and form of the Section 906 Certification should be. For example, to whom is it properly addressed and can it be qualified by knowledge? Should it be filed as an exhibit, a separate 8-K, or even as a supplemental letter filed on EDGAR with, or separate from, the subject report?

Effective upon the SEC's adoption of implementing rules by August 29, 2002, CEOs and CFOs are required to provide in each filed annual and quarterly report a far more extensive certification, referred to as the Section 302 Certification, as to a variety of matters including, among others, the accuracy of the filed report, the design and sufficiency of the issuer's internal accounting controls, the disclosure to the audit committee of any significant weaknesses in the issuer's internal controls, as well as any fraud that involves management or other employees who have a significant role in preparing the financial statements, and whether the report indicates any significant changes in internal controls, including corrective actions for deficiencies. Again, this applies to all filing public companies, foreign or domestic. The SEC already has pending proposed rules addressing the substance of the Section 302 Certification for which comments are due by August 19, 2002. (See Exchange Act Release No. 34-46300.) Issuers will need to develop internal systems and safeguards to provide signing officers with sufficient assurance that both the Section 302 and Section 906 Certifications can be given.

Effective immediately, public companies are forbidden from providing, directly or indirectly, any extensions of credit, or renewing any extension of credit, as a personal loan to a director or executive officer. Loans outstanding on or prior to July 30, 2002, are not affected, provided that there is no material modification, extension, or renewal of the loan.

As of August 29, 2002, so-called "Section 16 insiders" must file Form 4 transaction reports within two days after the subject transaction rather than by the 10th day of the following month. Previously, as many as 40 days were allowed between the transaction and the filing. By July 30, 2003, all Section 16 reports must be filed via EDGAR.

Effective immediately, "whistleblower" protection is provided to employees who provide information to, or otherwise assist in, an investigation of securities law violations and securities fraud. This is designed to prohibit retaliatory discharge, demotion, or other changes in employment conditions of employees assisting in an investigation.

Effective immediately, liabilities related to securities fraud are not dischargeable in bankruptcy.

Effective immediately, the SEC has been granted enhanced enforcement powers, the statute of limitations for federal securities fraud claims has been extended to up to five years, and certain criminal penalties for securities law violations have been enhanced.

How Does the Act Affect the Audit Committee's Composition? The audit committee must be comprised solely of "independent" directors (i.e., non-employee, non-affiliate directors), although the SEC will have authority to grant limited exemptions. The requisite number of audit committee members has been relegated to the SROs. A director who is an officer, director, or general partner of a controlling stockholder presumably will be disqualified from audit committee membership due to affiliate status.

The SEC has been directed to adopt by January 26, 2003, regulations requiring issuers to disclose in their periodic reports whether at least one audit committee member is a financial expert (and if not, why not). The SEC has authority to define "financial expert" (based upon the member's

education and experience as an auditor, principal financial or accounting officer, and the member's experience with GAAP financial statement preparation, audit committee functions, and internal accounting controls). Audit committee members may not receive consulting fees from the issuer. They may, however, receive director and committee member fees, including in the form of stock awards and option grants. (Compensatory arrangements must be disclosed in the issuer's annual proxy statement and Form 10-K.)

How Does the Act Affect the Function of the Audit Committee and External Auditor--Audit Committee Relationship? The SEC has been directed to adopt regulations by April 26, 2003, requiring audit committees to establish procedures for addressing "whistleblower" complaints received by the issuer as to possible accounting irregularities, fraud, internal controls, and the audit process, and by that date the SEC is directed to order all national securities exchanges to prohibit the listing of securities of any reporting issuer the audit committee of which has not established such procedures.

All audit services (including comfort letters, consents, statutory audits for insurance companies, etc.) must be preapproved by the audit committee, and the audit committee is now exclusively responsible for the retention, compensation, and oversight of the external auditor (to the exclusion of management, the full board, and the stockholders) and the resolution of all disagreements between management and the external auditor regarding financial reporting. The preapproval of non-audit services can be delegated to any member of the audit committee, provided that the decision of any audit committee member is presented to the full audit committee at its next scheduled meeting.
The audit committee must receive a CEO and CFO certification as to any significant deficiencies or material weaknesses in the issuer's internal controls and with respect to any possible internal fraud or accounting irregularities (and the audit committee should meet periodically with the issuer's "disclosure SWAT team" discussed below).

The audit committee must have the authority to engage independent counsel and other professional advisors to assist in discharging the committee's function.

We believe that the Act does not purport to change the principal role (i.e., fiduciary responsibility) of the audit committee from one of oversight of the issuer's financial reporting process to one of independent verification of the accuracy and completeness of financial disclosure.

The Act has identified nine categories of "impermissible" non-audit services (e.g., financial information systems design and implementation, bookkeeping, legal and expert services, internal audit outsourcing services, appraisal/valuation services, fairness opinions, actuarial services, HR and management services). All permissible non-audit services must be preapproved by the audit committee and disclosed in the issuer's periodic reports.

The lead engagement partner for the external audit team and the lead external auditor review partner must be rotated every five years.

The external auditor cannot provide audit services to an issuer whose CEO, CFO, principal accounting officer, or controller was employed by the audit firm and participated in any audit of the issuer during the preceding year.

We note that the audit committee should establish a formal document retention policy for itself because the Act makes it a criminal offense to knowingly alter, destroy, mutilate, conceal, or falsify a record or document with the intent to obstruct or influence an investigation.

The issuer is required to fund, as determined by the audit committee, all compensation payable to the external auditor and professional advisors (including separate counsel) employed by the audit committee.

While an audit committee is required to review and discuss an issuer's annual report with management and the external auditors, the SEC has been directed to adopt regulations requiring issuers to provide in their annual reports an internal control report containing an assessment of the effectiveness of the issuer's internal control structure and procedures. This "review and discuss" requirement shoed encompass the foregoing and assure that the internal control provisions have been properly established. External auditors will be required to attest to management's internal control assessment.
By October 28, 2002, the SEC has been directed to adopt regulations requiring issuers to disclose in their Exchange Act filings whether they have established a "code of ethics" for their senior financial officers (and if not, why not). In addition, any modification or waiver of the code of ethics will require immediate Form 8-K disclosure.

In connection with its audit, the external auditor must report to the audit committee its assessment of the critical accounting policies and practices used by the issuer; all alternative treatments of financial information within GAAP that have been discussed with management (including the effect thereof and the treatment preferred by the external auditor); any disagreements between management and the external auditor; and any other material written communications between management and the external auditor (i.e., management letters and schedules of unadjusted differences).

How Does the Act Affect the Role of the CEO, CFO, and Internal Accounting and Financial Personnel? We suggest that each issuer consider the establishment of a "disclosure SWAT team" that is assigned specific responsibility for assuring the integrity of the issuer's internal controls, information and data gathering, collection and assembly procedures, and assuring the efficacy of the issuer's financial reporting functions.

* The team should periodically report to the CEO and CFO.

* The team should be composed of those officers and employees most knowledgeable and who have lead responsibility for the development and assessment of both financial and non-financial information. (At a minimum, the issuer's chief accounting officer and chief legal officer should be team members who should consult with representatives of the external auditor, the issuer's outside SEC counsel, and the issuer's internal audit employees.)

* The team also should include the heads of the issuer's significant subsidiaries, divisions, and business units (especially to the extent the issuer engages in segment reporting).

The employment by an issuer of a CEO, CFO, controller, principal accounting officer, or equivalent person who was employed by the issuer's external auditor and worked on the issuer's audit during the 12 months preceding the inception of the current audit engagement disqualifies such external auditor from providing audit services to the issuer.

The Act prohibits any "officer or director of an issuer" and persons "acting under the direction thereof" from taking any action to fraudulently influence, coerce, manipulate, or mislead any external auditor engaged in preparing an audit report, for the purpose of rendering such report false or misleading.

We suggest that the CEO and CFO establish comprehensive and reliable internal due diligence procedures and maintain their own detailed backup file memoranda and minutes of formal meetings with the "disclosure SWAT team" which document the scope, frequency, and level of inquiry, investigation, and comfort that each has undertaken and received to support the accuracy and completeness of the statements made in their Section 302 and Section 906 Certifications.

What Changes Will We Have to Make in Our Periodic Reports? Will We Have to File Them Sooner? Other than the Section 302 and Section 906 Certifications discussed above, the Act does not mandate any immediate changes to the content or filing dates of periodic reports. Of course, the SEC already has proposed accelerated filing dates for annual and quarterly reports, as well as current reports, but final action has not yet been taken. (See Exchange Act No. 34-46084.) The Act also authorizes the SEC to require disclosure on a "rapid and current" basis of additional information concerning material changes in financial condition and operations of an issuer. Again, the SEC already has a rule proposal pending that would enhance the requirements to report various events and transactions on a current basis via Form 8-K. Once the Public Company Accounting Oversight Board mandated by the Act (discussed below) has been established, the Act will require all filed financial reports to reflect all material correcting adjustments identified by an external auditor registered with the Public Company Accounting Oversight Board.

By January 26, 2003, the SEC is required to issue final rules requiring disclosure in quarterly and annual reports of all material off-balance-sheet transactions and arrangements that may have a material current or future effect on an issuer's results or financial condition. The Act also requires the SEC to conduct a comprehensive study of the extent of off-balance-sheet transactions and special purpose entities and the adequacy of disclosure.

By January 26, 2003, the SEC is required to issue final rules requiring that "pro forma" financial information included in filed reports or in any public disclosure or press or other release be presented in a manner that is not misleading and is reconciled with GAAP financial results. We advise our clients to be judicious in their use of "pro forma" information.

The Act requires the SEC to adopt rules mandating that an annual report contain an internal control report, which must include a management assessment of the issuer's internal control structure and procedures, attested to by the external auditors, and additional disclosures regarding whether the issuer maintains a code of ethics for senior financial officers. Changes to the code of ethics will have to be disclosed on a prompt basis.
How Does the Act Relate to the SEC's One-Time-Only CFO/CEO Attestation Directive Issued to the 947 $1.2 Billion Revenue Companies on June 27, 2002? In effect, Section 302 of the Act orders the SEC to promulgate rules prior to August 29, 2002, that will make this directive permanent and applicable to all issuers filing reports under Section 13(a) or 15(d) of the Exchange Act.

Are the Section 302 and Section 906 Certifications Applicable to Filings Such as Proxy Statements and Forms 8-K? Sections 302 and 906 of the Act do not apply to the issuer's proxy or information statements filed pursuant to Regulations 14A or 14C under the Exchange Act, nor do they apply to so-called Williams Act filings. We do not know at this time whether that was an oversight that will be addressed later (to the extent such filings may contain and incorporate by reference substantial issuer or registrant-related financial information).

It is unclear at this time whether the Section 906 Certification requirement applies to current reports on Form 8-K, and the issue may turn on the content of the report and whether the information is "filed" or merely "furnished" for Regulation FD purposes. Absent further definitive guidance or clarification from the SEC, we suggest close consultation with counsel.

Is the Section 302 Certification Applicable Only to Domestic Issuers? No. Foreign private issuers as defined in Rule 3b-4(c) under the Exchange Act are subject to the certification requirement, although (similar to domestic issuer current reports on Form 8-K) it appears that Section 302 does not apply to reports on Form 6-K because such reports would not be considered "periodic reports," such as Forms 20-F and 40-E

Generally, foreign private issuers who are subject to the periodic reporting requirements of Section 13(a) or 15(d) of the Exchange Act (i.e., because they have undertaken Level 2 or Level 3 ADS listing programs in the U.S.) are subject to the Act. Foreign private issuers with Level 1 ADS programs who "furnish" reports to the SEC under the so-called "information supplying exemption" prescribed by Rule 12g3-2(b) under the Exchange Act are not generally subject to the Act.

Will the SEC Change the Way or Frequency with Which It Reviews Our Reports? The Act mandates that the SEC review Exchange Act reports "on a regular and systematic basis." In addition, the SEC must review every reporting issuer's Exchange Act filings at least once every three years. In establishing its review system, the SEC is required to consider issuers 1) that have restated their financial results, 2) that are so-called "large capitalization" issuers, 3) that are emerging or earlier-stage companies with disparate P/E ratios, 4) that have significant stock price volatility, and 5) whose business operations significantly impact a material sector of the domestic economy. In support of this and the Act's other requirements, the SEC's funding has been increased by more than $770 million for fiscal 2003 with instructions to add not fewer than 200 additional investigative professionals.

Does the Act Affect Compensation of Our Officers? What Impact Is There on Stock Options? If an issuer is required, as a result of misconduct, to restate its financial statements due to material non-compliance with the accounting rules, the CEO and CFO must reimburse the issuer for 1) any bonus or other incentive or equity-based compensation received during the 12-month period following the first public issuance or filing with the SEC of the financial statements being restated and 2) **profits** realized from the sale of issuer securities during such 12-month period.

The Act does not specifically address stock options. Recently, several large public companies announced that they are voluntarily revising the accounting treatment they afford to executive option grants. For example, General Electric announced that it would begin to account for the value of stock options granted to employees as an expense, thereby reducing its reported earnings. In addition, responding to criticism that options-heavy pay packages have given executives enormous incentives to create short-term **profits**, General Electric said that it would require its top officers to hold, for at legist a year, some of the **shares** they acquire after exercising options and that those officers would have to hold substantial stock positions as long as they work at GE. Other large companies such as Procter & Gamble, Coca-Cola, The Washington Post Company, Bank One, and Amazon.com similarly have decided to account for stock option, grants as an expense.

Do Currently Outstanding Loans to Our Directors and Officers Have to Be Repaid Immediately? As noted above, effective immediately, the Act

prohibits all public companies from, directly or indirectly, extending, maintaining, arranging, or renewing any extension of credit in the form of a personal loan to or for any of its directors or executive officers. However, an extension of credit that was outstanding as of July 30, 2002, is not prohibited, provided that there is no material modification to any term of that extension of credit or renewal of the extension of credit after such date. The term "credit" may be interpreted broadly to include other financial arrangements, including guaranties of indebtedness, in addition to traditional loans.

The Act provides a limited exception for extensions of credit by companies that are engaged in the consumer credit business. This exception permits home-improvement loans and manufactured-home loans, consumer credit, extensions of credit under an open-end credit plan or charge card, and extensions of credit by a broker-dealer to its employees for purposes of trading in securities, provided that the extension of credit is made in the ordinary course of the consumer credit business of the issuer, is of a type that is generally made available by that issuer to the public, and is made on market terms, or on terms that are no more favorable than those offered by the issuer to the general public.

Any violation of the prohibition on extensions of credit to directors and officers is a criminal offense.

Does the Act Limit Trading in Our Stock by Officers and Directors? The Act prohibits all executive officers and directors of any issuer from purchasing, selling, or otherwise acquiring or transferring any equity securities of that issuer obtained in connection with their employment or service during employee benefit plan "blackout" periods. Generally, a blackout period is any period of more than three consecutive business days during which at least 50% of the participants in the issuer's 401(k) or similar plans are subject to specified restrictions on trading in the issuer's securities held for their account in such plans.

Any **profits** realized from a prohibited transaction will be recoverable by the issuer regardless of the officer's or director's intent. If the issuer fails to take action to recover these **profits** within 60 days following a stockholder request, the issuer's stockholders will have the right to commence a private action to recover these **profits** on the issuer's behalf.

The issuer will be required in a timely manner to notify each director and executive officer, as well as the SEC, of each blackout period. Generally, the notice must be provided no later than 30 days prior to any anticipated blackout period, subject to some exceptions. The notice will be required to state the reasons for the blackout, the investment and other rights affected, and the duration of the blackout.

The SEC is directed to issue rules to clarify this provision of the Act and provide for exemptions.

Effective August 29, 2002, the Act significantly shortens the period of time for executive officers, directors, and principal stockholders to file Section 16 reports of transactions in the issuer's securities to two business days after the transaction is executed.

What Else Should We Know About the Act? Effective upon the SEC's adoption of implementing rules, but not later than January 26, 2003, attorneys appearing and practicing before the SEC will be required to report "evidence of a material violation of securities law, breach of fiduciary duty, or similar violation" by the issuer or any of its agents to the issuer's chief legal counsel or its chief executive officer. In the event

that the officer does not appropriately respond to the evidence by adopting appropriate remedial measures or sanctions with respect to the violation, the attorney must report the evidence to the audit committee or another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer or to the board of directors. We believe this codifies long-standing state bar association ethics requirements for attorneys and judicial pronouncements regarding the role of counsel in this context.

The Act criminalizes certain conduct and increases penalties for a variety of offenses. Moreover, a violation of the Act is treated as a violation of the Exchange Act.

The Act also makes it easier for the SEC to bar an individual from acting as a director or an officer of an issuer by reducing the standard of fitness required for a ban. Also, the Act provides the SEC direct power to bar a person from acting as a director or officer of an issuer through an administrative proceeding rather than in a court action. The Act makes it unlawful for an issuer knowingly to employ a barred person in an accountancy or financial management capacity.

Effective immediately, the Act criminalizes the knowing alteration, destruction, mutilation, concealment, or falsification of any record with the intent to impede, obstruct, or influence any governmental investigation or other governmental function or any bankruptcy proceeding. The penalty is a fine and/or imprisonment for up to 20 years.

Effective immediately, the Act criminalizes the knowing and willful destruction of any audit or review workpapers. Under the Act, external auditors are required to maintain all such workpapers for five years. The penalty is a fine and/or imprisonment for up to 10 years.

Effective immediately, the Act extends the statute of limitations for private lawsuits involving securities fraud to the earlier of two years after the discovery of the underlying facts or five years after the violation.

Effective immediately, the Act provides that the knowing commission of securities fraud with respect to an issuer is punishable by a fine and/or imprisonment for up to 25 years.

To improve the objectivity of research and provide investors with more useful and reliable information, the Act directs the SEC (or, at its discretion, a registered securities association or national securities exchange) to adopt not later than July 30, 2003, regulations requiring greater separation of research analysts from the investment banking departments of financial institutions and prescribing "quiet periods" during which underwriters of public offerings and broker-dealer participants cannot publish research (or "street") reports. These rules will include:

* prohibiting investment banking personnel from supervising analysts or evaluating their compensation;

* restricting the pre-publication clearance, or approval of research reports by investment bankers or persons not directly responsible for investment research, other than legal or compliance staff;

* prohibiting investment banking departments from retaliating against, or threatening to retaliate against, any securities analyst as a result of an adverse, negative, or otherwise unfavorable research report that may adversely affect an investment banking relationship of the financial

institution with the issuer that is the subject of the research report (except the rules may not limit the authority of a financial institution to discipline a securities analyst for causes other than such research report in accordance with the policies and procedures of the financial institution); and

* establishing structural and institutional safeguards ("Chinese walls") to separate research analysts from the review, pressure, or oversight of those in the **investment** banking department of the financial institution.

The Act also directs the SEC (or, at its **discretion**, a registered securities association or national securities exchange) to adopt not later than July 30, 2003, rules reasonably designed to require disclosure of any conflicts of interest that are known, or should have been known, by the research analyst or broker-dealer.

The Act authorizes the study of, among other matters, 1) the role of financial advisors and investment banking firms in providing "earnings management" advice and services to issuers (which may have the effect of distorting the issuer's financial condition), 2) whether U.S. GAAP and so-called "rules-oriented" accounting standards should be replaced or augmented by a more "principles-oriented" system of accounting (such as that used by European issuers under International Accounting Standards), 3) the trend of consolidation of external auditors and whether there should be mandatory rotation of external auditors, and 4) the functions of credit rating agencies.

The Act established a five-member Public Company Accounting Oversight Board (the Board) the members of which (two of whom must be CPAs) will serve five-year, full-time terms (subject to a two-term maximum), and who will be appointed by the SEC in consultation with the Secretary of the U.S. Treasury Department and the Chairman of the Federal Reserve Board. The appointments must be made not later than October 28, 2002. Three of the members must be from outside the accounting profession and the Board must be operating under the auspices of the SEC not later than April 26, 2003. Board members may not receive payments from a public accounting firm (or any other person, as determined by SEC rules), other than fixed continuing payments under standard retirement arrangements. The SEC can remove Board members for cause. The Board principally will be funded by fees charged to reporting issuers and external auditors will pay annual registration fees to cover the Board's costs of processing applications and annual reports.

* Only those external auditors (including foreign accounting firms) registered with the Board will be permitted to audit public companies.

* Registration applications will include substantial information regarding the accounting firm's recent history relating to public company audit clients, including: 1) the names of all clients for which the firm prepared or issued audit reports in the past year and for which it expects to prepare or issue audit reports during the current year, 2) the annual fees received by the accounting firm from each issuer for audit services and non-audit services, 3) a statement of quality control policies of the firm, 4) a list of all accountants associated with the firm who participate in the preparation of audit reports, 5) information relating to criminal, civil, or administrative proceedings pending against the firm or any associated person in connection with any audit report, 6) copies of any disclosure filed by an issuer with the SEC in the past year that indicates accounting disagreements between the issuer and the firm in connection with an audit report furnished or prepared by the firm for the issuer, 7) a consent of the firm to comply with Board requests for testimony or documents and an agreement to obtain a similar consent from each accountant

as a condition of continued employment, and 8) such other information as the Board or SEC may require.

* Accounting firms will be required to update their registrations annually.

* The Act requires the Board to adopt auditing and related attestation standards and ethics standards to be used by external auditors in the preparation and issuance of their audit examination reports.

* The Act further requires the Board to promulgate standards for external auditor quality controls, including internal and external consulting on audit issues, audit supervision, hiring and training of audit personnel, client intake and engagement matters, ethical considerations, and independence matters.

* The Board will be required to conduct a "program of inspections" to assess compliance by each registered public accounting firm and its associated persons with the Act, with SEC and Board rules, and with professional standards, which will replace the existing "peer review" system.

* Board inspections will be conducted annually for each firm that regularly provides audit reports for more than 100 issuers, and at least once every three years for firms that regularly provide audit reports for 100 or fewer issuers, although the Board can modify this inspection schedule, as appropriate.

* The Board will have authority to investigate violations of the Act as well as the Board's rules and professional accounting and auditor conduct rules, and may compel testimony and document production and impose sanctions for non-compliance (including revocation or suspension of a registered firm's registration, the imposition of civil penalties, and denial of authority to audit public companies).

* The Board may refer investigations to the SEC, or with the SEC'S approval, to the U.S. Department of Justice.

CONCLUSION

Coming to grips with the Act will be a challenge for the public company community and the professionals who serve it. Much of the heavy lifting has been left to SEC rule-making to implement many of the Act's provisions and to clarify their requirements. Whether the Act will result in new or greater liability for directors and officers only time can tell, although one can expect the SEC and private plaintiffs' bar to explore the Act's limits.

Each public company will need to evaluate carefully how it complies with the Act's requirements by appropriately modifying and monitoring its internal accounting and financial reporting processes, relationships with external auditors and other professional advisors, audit committee charters, codes of conduct, compensation policies, executive contracts, human resource and investor relations policies, and many other aspects of daily operations. We encourage public companies to consult with counsel, as necessary, to develop tailor-made systems and procedures to assure compliance with the Act.

In that this is a fluid and evolving area that necessarily affects multiple levels of the issuer's reporting function, management accountability, and the role of independent directors, the issuer/external auditor relationship, SRO listing standards, corporate transparency and the like, we and other attorneys will continually update our clients when material

developments occur and "best practices" evolve.

ADDENDUM

Since this article was first written in the form of a firmwide alert to the authors' clients, the SEC has adopted rules, as required by the Act, implementing accelerated reporting under Section 16(a) of the Exchange Act the Section 302 Certification. In addition, the SEC has promulgated final rules (proposed prior to the Act's adoption) which require accelerated filing of annual and quarterly reports by companies with a $75 million or greater public float. Accelerated filing will be phased in over the next three years, beginning with annual reports for fiscal years ending on or after December 15, 2003. These rules, and the others to come, will, to a certain extent, increase the administrative burden on public companies and their financial reporting systems. However, with careful preparation and the adoption of enhanced systems, these new requirements should provide an improved disclosure system and restore investor confidence in the integrity of our domestic capital markets.

Editor's Note

Michael H. Hein, Clifford E. Neimeth, Ira N. Rosner, and Fern S. Watts are corporate shareholders in the national law firm, Greenberg Traurig, LLP.

Mr. Neimeth is resident in the firm's New York office, where he specializes in public M&A transactions, corporate governance, and federal securities law matters.

Messrs. Hein and Rosner and Ms. Watts are resident in the firm's Miami office, where they specialize in corporate transactions and federal securities law matters.

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At stake is Paxson's agreement to be acquired by NBC, a deal that was seriously complicated when NBC instead decided to buy Spanish-language television network Telemundo and risk running afoul of station ownership caps by potentially owning three networks.

"For us, a loss is status quo -- it's living with the agreement that we have in place through 2004, where we have a right to take NBC our," Paxson recently told investors and analysts in discussing the company's second-quarter earnings.

NBC not only invested $415 million in Paxson as a first step toward acquiring the company's family-oriented Pax TV network and 65 stations but also gained various contractual rights, including an opportunity to buy out Bud Paxson's **shares**.

"A win for us is probably an arbitrator saying (NBC) violated the contract and you can take them out now and don't have to wait until 2004," Paxson said. "Either way, we are in serious negotiations now with more than one investment banker and will be choosing one shortly to -- following the decision of the arbitrator -- evaluate our strategic options."

The West Palm Beach, Fla.-based company, whose Pax TV network is behind such shows as "Doe" and "It's a Miracle," clearly wants to find a new partner (interested parties are said to include the Walt Disney Co., Sony Corp., Viacom and MGM) and is eager to do so as soon as it can put the arbitration behind it.

The reality may be a lot more complicated and, analysts say, obligate Paxson to repay NBC its investment, plus 8%, even if it prevails in court. Both sides made their final arguments July 24, and the ruling cannot be appealed.

NBC declined comment on the arbitration Monday, and analysts said it is too difficult to predict an outcome because the arbitrator wields so much **discretion**.

Repaying NB C's **investment** -- provided that Paxson

doesn't get the agreement nullified for breach of contract or win offsetting damages -- would be very difficult because Paxson already has $871 million of debt, creating liquidity issues that have worried investors. Paxson has arranged a new bank credit facility allowing it to sell some stations and use the **proceeds** to offset the cash crunch.

One source of pressure is the federal government's repeated delay of the auction of UHF spectrum, which could net Paxson $200 million-$1 billion.

In the meantime, Paxson hopes to raise $100 million by year's end from the sale of noncore assets, which should carry it through 2004, when it expects to start generating free cash flow. The company has already raised $35 million by selling Fresno station KPXF.

Another showdown looms within the 60 days after Sept. 15, when NBC is contractually allowed to demand that Paxson pay back its investment -- now worth $500 million and held by NBC in form of Paxson preferred stock. Paxson would have a year to buy back its stock on its own -- an unlikely scenario - or find an outside party to buy it.

If that 12-month deadline is not met, NBC can sell its interest in Paxson to a third party. Conversely, Paxson has the right to buy out NBC's investment beginning in 2004.

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Potential buyers and partners have expressed interest, but serious negotiations will not begin until the arbitration is concluded, Paxson said.

Analysts say it is also possible that Paxson and NBC will repair the damage. Bud Paxson declined to address that issue in the recent earnings call, other than to say that Paxson felt totally justified in bringing the arbitration and is confident that the outcome will be favorable to its cause.

The two companies remain intertwined at an operational level through joint sales agreements in which many of Paxson's stations are operated out of NBC-owned or -affiliated stations in markets they **share**. NBC staff continues to function as Paxson's exclusive sales representatives to sell local advertising, a successful partnership that paved the way for NBC's interest in acquiring Paxson.

"Ultimately, we still believe Paxson and NBC may find a way to patch up their public squabble and go forward with their intended merger on meaningful ownership deregulation anticipated sometime next year," Wachovia Securities analyst Bishop Cheen said.

RELATED ARTICLE: Paxson Communications Corp.

Founded: 1991

Headquarters: West Palm Beach, Fla.

Key executives: Lowell Bud" Paxson (left), chairman; Jeff Sagansky, president and CEO; Dean Goodman, president and chief operating officer of Pax TV network

Assets: Owns and operates 65 television stations, making it the largest U.S. TV station group

Programming: Family-oriented Pax TV network reaches 87% of U.S. television households through broadcast, cable and satellite

Revenue: $308.8 million last year, with cash flow of $18.1 million

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Event Names: *980 (Legal issues & crime)
Geographic Names: *1USA (United States)
Product Names: *4833100 (Television Networks)
Industry Names: ARTS (Arts and Entertainment); BUSN (Any type of business); INTL (Business, International)
SIC Codes: 4833 (Television broadcasting stations)
NAICS Codes: 51312 (Television Broadcasting)
Ticker Symbols: PXN

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Potential buyers and partners have expressed interest, but serious negotiations will not begin until the arbitration is concluded, Paxson said.

Analysts say it is also possible that Paxson and NBC will repair the damage. Bud Paxson declined to address that issue in the recent earnings call, other than to say that Paxson felt totally justified in bringing the arbitration and is confident that the outcome will be favorable to its cause.
The two companies remain intertwined at an operational level through joint sales agreements in which many of Paxson's stations are operated out of NBC-owned or -affiliated stations in markets they **share**. NBC

staff continues to function as Paxson's exclusive sales representatives to sell local advertising, a successful partnership that paved the way for NBC's interest in acquiring Paxson.

"Ultimately, we still believe Paxson and NBC may find a way to patch up their public squabble and go forward with their intended merger on meaningful ownership deregulation anticipated sometime next year," Wachovia Securities analyst Bishop Cheen said.

RELATED ARTICLE: Paxson Communications Corp.

Founded: 1991

Headquarters: West Palm Beach, Fla.

Key executives: Lowell Bud" Paxson (left), chairman; Jeff Sagansky, president and CEO; Dean Goodman, president and chief operating officer of Pax TV network

Assets: Owns and operates 65 television stations, making it the largest U.S. TV station group
Programming: Family-oriented Pax TV network reaches 87% of U.S. television households through broadcast, cable and satellite

Revenue: $308.8 million last year, with cash flow of $18.1 million

Company Names: PAXSON COMMUNICATIONS CORP
Industry Names: Broadcasting; Entertainment; Information industry
Product Names: Television networks (483321)
Concept Terms: All company; Capital expenditures; Corporate strategy; Financial data; Mergers, acquisitions & divestitures
Geographic Names: North America (NOAX); United States (USA)

66/9/7 (Item 7 from file: 148)
14848659 **Supplier Number:** 90202350 (THIS IS THE FULL TEXT)
Phoenix Reports Second Quarter 2002 Results.

Business Wire , 2037
August 8 , 2002
Language: English
Record Type: Fulltext
Word Count: 2565 **Line Count:** 00366

Text:

Business Editors

HARTFORD, Conn.--(BUSINESS WIRE)--Aug. 8, 2002

Editor's Note: The company considers operating income and cash operating income, excluding venture capital, in evaluating its financial performance, in addition to net income presented in accordance with Generally Accepted Accounting Principles (GAAP). (See attached table reconciling these measures.) Operating income represents net income adjusted for realized investment **gains** and losses and nonrecurring items. Nonrecurring items include expenses related to Phoenix's demutualization and its acquisition of the PXP minority interest, an early retirement program, an adjustment to the amortization of deferred acquisition costs, management restructuring reserves, and the cumulative effect of accounting changes. For cash operating income, the company adds back amortization of intangible assets to operating income to measure the ability of the business to generate cash earnings. The company excludes the Venture Capital segment, a separate reporting segment, to measure the performance of its core operating businesses in order to provide greater transparency when evaluating operating performance.

The Phoenix Companies, Inc. (NYSE: PNX) today reported second quarter 2002 cash operating income, excluding venture capital, of $23.6 million, or $0.24 per **share**, compared with $29.9 million, or $0.28 per **share**, in the second quarter of 2001. The company also reported an operating loss of $4.1 million, or a $0.04 loss per **share**, for the quarter, compared with operating income of $19.2 million, or $0.18 per **share**, in the second quarter of 2001. The company reported a GAAP net loss of $37.2 million, or a $0.37 loss per **share**, in the second quarter of 2002, compared with a $16.5 million net loss, or a $0.16 loss per **share**, in the second quarter of 2001. The second quarter 2002 GAAP result includes after-tax operating losses of $19.4 million from: venture capital; net realized investment losses of $10.7 million, primarily attributable to impairments of debt securities, notably WorldCom; and a reserve of $21.8 million, after income taxes, primarily in connection with organizational and employment-related costs. This reserve includes the reserve announced on July 1, 2002.

Chairman and Chief Executive Officer Robert W. Fiondella said, "We performed to plan in a number of key areas, but the exceptionally difficult equity and credit environment impacted our overall second quarter results. However, our sharp focus on driving the business resulted in continued progress and action in those areas we could control, including increasing the scope of expense reduction initiatives and managing our corporate investment portfolio in an appropriately conservative manner.

"At the same time, we are pleased that the fundamentals underlying our businesses remained solid, as reflected in continued retail sales momentum, as well as mortality and persistency," Mr. Fiondella added, "and we remain committed to our objective of achieving an 8 to 10 percent cash return on equity, excluding venture capital, by the end of 2003."

Mr. Fiondella also confirmed that he and Coleman D. Ross, executive vice president and chief financial officer, would be signing, by the upcoming deadline, the SEC certifications of Phoenix's 2001 Form 10-K and its subsequent Forms 10-Q.

First half 2002 cash operating income, excluding venture capital, was $49.3 million, or $0.49 per **share**, compared with $40.5 million, or $0.38 per **share**, in the first half of 2001. The company also reported operating income of $8.7 million, or $0.09 per **share**, for the first half, compared with an operating loss of $69.4 million, or a $0.66 loss per **share**, in the prior year's first half. The company reported a GAAP net loss of $138.6 million, or a $1.38 loss per **share**, in the first half of 2002, primarily due to the first quarter adoption of an accounting change for goodwill and continued weak performance of venture capital, compared with a $174.0

million net loss, or a $1.66 loss per **share**, in the first half of 2001.

Mr. Fiondella also cited the following developments:

-- Accelerated sales from a growing number of distribution sources in life insurance, annuities and managed accounts.

-- Maintained strong fundamentals in life insurance - mortality and persist ency - as evidenced by continued growth in the policyholder dividend obligation and other key ratios.

-- Announced consolidations in the Phoenix/Zweig Advisers organization that will result in annualized expense reductions of $3 million, in addition to the previously announced reductions of approximately $26 million the compa ny is on track to achieve by year-end 2002. These expense reductions will, in part, counter the impact of negative markets on pension expenses and mar gins.

-- Grew invested assets and cash in the corporate investment portfolio to $ 15.3 billion on June 30, 2002, from $13.5 billion on June 30, 2001. The str ength of the company's well diversified, high-quality bond portfolio contributed to the growth. At the end of the second quarter, below investme nt grade bonds comprised 7 percent of the total bond portfolio, the lowest level since 1998.

-- Increased scale with the acquisition of the variable life and variable a nnuity business of a CNA Financial Corporation subsidiary through a coinsur ance arrangement, announced at the end of June and effective July 1, 2002.

-- Continued active capital management. As of June 30, 2002, 8.4 million **shares** had been purchased through the company's 11 million-**share** stock repurchase program, with an additional 1.8 million **shares** purchased through August 2, 2002.
On August 5, Phoenix's Board of Directors authorized a program to repurchas e an additional 2 million **shares**.

-- Management and organizational changes in July and August, including, eff ective September 1, the retirement of Philip R. McLoughlin, chairman and ch ief executive officer of Phoenix Investment Partners, Ltd. During a transit ion period, Mr. McLoughlin will continue to report to Dona D. Young, presid ent and chief operating officer.

Segment Results

Phoenix has two operating segments, "Life and Annuity" and "Investment Management", and two reporting segments, "Venture Capital" and "Corporate and Other". The Corporate and Other segment includes unallocated capital and expenses, as well as certain businesses not of sufficient scale to report independently. The company looks at its segment results on the basis of operating income (loss) before amortization and income taxes to focus on the earnings ability of each segment.

	Second Quarter 2002	Second Quarter 2001
	(in millions)	
Life and Annuity	$ 27.9	$ 38.5
Investment Management	8.6	13.9

Venture Capital	(29.9)	5.5
Corporate and Other	(11.3)	(19.4)

Life and Annuity - Operating income before amortization and income taxes in the second quarter of 2002 was $27.9 million, compared with $38.5 million in the second quarter of 2001. The decrease is due primarily to a one-time recognition of $15.8 million in the prior year's quarter related to establishment of the closed block, pursuant to accounting rules for newly demutualized companies. Excluding this gain, earnings rose 23 percent over the prior year's quarter. Universal life and other life insurance earnings increased, while annuity earnings declined due to the weak market environment.

Total life insurance sales (annualized premium and single premium) were $55.8 million in the second quarter of 2002, a 21 percent increase compared with $46.2 million in the prior year's quarter. Annualized premium was $37.7 million in the second quarter of 2002, compared with $32.8 million in the prior year's quarter. The growth was driven in large part by sales of variable universal life and universal life products. Survivorship life insurance sales were more than double last year's level and continued to represent approximately one-third of all life insurance sales.

Annuity deposits in the second quarter of 2002 were $661.0 million, compared with $377.4 million in the prior year's quarter, reflecting continued strong sales in key broker-dealer relationships and growing sales of fixed annuities.

Both life and annuity sales from State Farm continued to grow, with more than half of the 10,000 eligible State Farm agents now certified to sell Phoenix products.

Investment Management - Operating income before amortization and income taxes was $8.6 million for the second quarter of 2002, compared with $13.9 million in the second quarter of 2001. The current quarter includes results from the acquisition of 60 percent of Kayne Anderson Rudnick Investment Management on January 29, 2002. Excluding the positive impact of the Kayne Anderson Rudnick acquisition, there was an overall decline in operating margins due primarily to lower revenues in other parts of Investment Management, partially offset by lower expenses.

Assets under management for the segment on June 30, 2002, were $56.6 billion, compared with $54.8 billion on June 30, 2001. The year-over-year increase in assets is attributable to the inclusion of Kayne Anderson Rudnick in 2002, partially offset by negative market performance.

Net flows were negative $552.1 million in the second quarter of 2002, compared with positive net flows of $1.1 billion in the prior year's quarter. Inflows totaled $3.1 billion in the second quarter of 2002, about even with inflows in the prior year's quarter. Strong sales of managed account products, particularly Kayne Anderson Rudnick's, represented more than half of the current quarter's inflows, and net flows for managed accounts were positive. Outflows were $3.6 billion in the second quarter of 2002, compared with $2.0 billion in the prior year's quarter. The increase in outflows relates primarily to the loss of several institutional accounts.

Venture Capital - In the second quarter of 2002, venture capital had a $29.9 million operating loss before amortization and income taxes, compared with operating income of $5.5 million in the second quarter of 2001. The decline reflects the impact of the weak equity markets in the second quarter on the company's estimates of its holdings. Total distributions in the second quarter of 2002 were $6.1 million, compared with $20.1 million in the second quarter of 2001. Capital contributions were $7.5 million in the second quarter of 2002, compared with $11.2 million in the second quarter of 2001. On June 30, 2002, venture capital assets were $261.8 million, representing 2 percent of the $15.3 billion of invested assets and cash in the general account portfolio.

Corporate and Other - In the second quarter of 2002, the Corporate and Other segment had an $11.3 million operating loss before amortization and income taxes, compared with a $19.4 million operating loss in the

second quarter of 2001. The improvement was due to higher corporate investment income resulting from the investment of the **proceeds** from the company's June 2001 IPO and a lower level of corporate expenses.

Other Developments

Effective on June 25, 2002, the first anniversary of the company's demutualization, the company issued stock options representing 4.4 million **shares** to its officers and directors at an exercise price of $16.20. Phoenix has chosen to account for the issuance of these stock options as capital transactions and will provide pro forma disclosures in its Form 10-Q of earnings and earnings per **share** as if it had elected to treat the options as compensation expense. The company will continue to monitor developments in stock option accounting and may change the accounting for future option grants as clear guidance is developed.

Conference Call

The Phoenix Companies, Inc. will host a conference call today at 11:00 a.m. Eastern time to discuss with the investment community Phoenix's second quarter financial results. The conference call will be broadcast live over the Internet at www.phoenixwm.com in the Investor Relations section. To listen to the live call, please go to the Web site at least fifteen minutes prior to register, download and install any necessary audio software. The call can also be accessed by telephone at 973-321-1020. A replay of the call will be available by telephone at 973-341-3080 (passcode 3360516) and on Phoenix's Web site, www.phoenixwm.com in the Investor Relations section through August 15, 2002.

The Phoenix Companies, Inc. (NYSE: PNX) is a leading provider of wealth management products and services to individuals and institutions. Through a variety of advisors and financial services firms, Phoenix helps the affluent and high net worth accumulate, preserve and transfer their wealth with an innovative portfolio of life insurance, annuity and investment management products and services. With a history dating to 1851, The Phoenix Companies, Inc. has two principal operating subsidiaries, Phoenix Life Insurance Company and Phoenix Investment Partners, Ltd. The company offers trust services through Phoenix National Trust Company and private placement insurance products through Philadelphia Financial Group, both subsidiaries. Phoenix has corporate offices in Hartford, Conn. For more information on Phoenix, visit www.phoenixwm.com.

Forward-Looking Statement

This release contains statements which constitute forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. These include statements relating to trends in, or representing management's beliefs about, the company's future strategies, operations and financial results, as well as other statements including words such as "anticipate", "believe," "plan," "estimate," "expect," "intend," "may," "should" and other similar expressions. Forward-looking statements are made based upon management's current expectations and beliefs concerning trends and future developments and their potential effects on the company. They are not guarantees of future performance. Actual results may differ materially from those suggested by forward-looking statements, as a result of risks and uncertainties which include, among others: (i) changes in general economic conditions, including changes in interest rates and currency exchange rates; (ii) heightened competition, including with respect to pricing, entry of new competitors and the development of new products and services by new and existing competitors; (iii) the company's primary reliance, as a holding company, on dividends from its subsidiaries to meet debt payment obligations and the applicable regulatory restrictions on the ability of the subsidiaries to pay such dividends; (iv) regulatory, accounting or tax changes that may affect the cost of, or demand for, the products or services of the company's subsidiaries; (v) downgrades in the claims paying ability or financial strength ratings of the company's subsidiaries; (vi) discrepancies between actual claims experience and assumptions used in setting prices for the products of the company's insurance subsidiaries and

establishing the liabilities of such subsidiaries for future policy benefits and claims relating to such products; (vii) movements in the equity markets that affect our investment results including those from venture capital, the fees we earn from assets under management and the demand for our variable products; (viii) the company's success in achieving its planned expense reductions; and (ix) other risks and uncertainties described from time to time in the company's filings with the Securities and Exchange Commission. The company specifically disclaims any obligation to update or revise any forward-looking statement, whether as a result of new information, future developments or otherwise.

Financial Highlights (Unaudited)

Income Statement Summary ($ in millions)

	Second Quarter 2002	Second Quarter 2001	Year-to-Date June 30, 2002	Year-to-Date June 30, 2001
Revenues	$ 592.4	$ 627.7	$ 1,186.3	$ 1,191.8
Operating Income (Loss) (1)	(4.1)	19.2	8.7	(69.4)
Add: Amortization of Goodwill and Intangibles	8.3	14.3	17.9	27.5
Cash Operating Income (Loss)	4.2	33.5	26.6	(41.9)
Cash Operating Income, excluding Venture Capital	23.6	29.9	49.3	40.5
GAAP Reported: Net Loss	(37.2)	(16.5)	(138.6)	(174.0)

Earnings Per **Share** (2)

	Second Quarter 2002	Second Quarter 2001	Year-to-Date June 30, 2002	Year- to-Date June 30, 2001
Operating EPS	$ (0.04)	$ 0.18	$ 0.09	$ (0.66)
Cash Operating EPS	$ 0.04	$ 0.32	$ 0.27	$ (0.40)
Cash Operating EPS, excluding Venture Capital	$ 0.24	$ 0.28	$ 0.49	$ 0.38
Net Loss Per **Share**	$ (0.37)	$ (0.16)	$ (1.38)	$ (1.66)

Balance Sheet Summary ($ in billions)	Second Quarter 2002	Second Quarter 2001
Invested Assets	$ 15.3	$ 13.5
Separate Account and Investment Trust Assets	5.4	5.3
Total Assets	23.3	21.3
Total Equity	2.2	2. 4
Book Value Per **Share** (3)	$ 22.57	$ 22.77
Assets Under Management	66.0	63.1

(1) Operating income represents net income adjusted for realized **gains**

and some non-recurring items because they are not indicative of the ongoing operations of the business segments. The size and timing of realized **investment gains** are often subject to management's **discretion**. Certain non-recurring items are removed from net income if, in management's opinion, they are not indicative of overall operating trends. While some of these items may be significant components of our net income, we believe operating income is an appropriate measure that represents the net income attributable to the ongoing operations of the business. However, operating income is not a substitute for net income determined in accordance with generally accepted accounting principles, and may be different from similarly titled measures of other companies.

(2) Weighted average **shares** outstanding for second quarter 2002 is 99.5 million **shares**. Weighted average **shares** outstanding for second quarter 2001 is 104.6 million pro forma **shares**. Weighted average **shares** outstanding for year-to-date 2002 and 2001 are 100.3 million **shares** and 104.6 million pro forma **shares**, respectively.

(3) Book value per **share** is based on 98.0 million as of June 30, 2002. Book value per **share** is pro forma based on 105.0 million **shares** outstanding as of June 30, 2001.

Consolidated Balance Sheet
As of June 30, 2002 and December 31, 2001
(in millions, except per **share** data)

	2002	2001
ASSETS:		
Available-for-sale debt securities, at fair value	$10,679.8	$ 9,607.7
Equity securities, at fair value	316.9	290.9
Mortgage loans, at unpaid principal balances	497.3	535.8
Real estate, at lower of cost or fair value	75.2	83.1
Venture capital partnerships, at equity in net assets	261.8	291.7
Affiliate equity and debt securities	349.8	330.6
Policy loans, at unpaid principal balances	2,182.5	2,172.2
Other investments	284.1	282.4
Total investments	14,647.4	13,594.4
Cash and cash equivalents	662.7	815.5
Accrued investment income	213.0	203.1
Premiums, accounts and notes receivable	163.3	147.8
Reinsurance recoverable balances	29.1	21.3
Deferred policy acquisition costs	1,212.1	1,123.7
Premises and equipment	115.5	117.7
Deferred income taxes	--	1.8
Goodwill and other intangible assets	847.6	858.6
Net assets of discontinued operations	20.8	20.8

Other general account assets	64.5	50.7
Separate account and investment trust assets	5,365.2	5,570.0
Total assets	$23,341.2	$22,525.4
LIABILITIES:		
Policy liabilities and accruals	$14,181.4	$13,005.0
Policyholder deposit funds	357.5	356.6
Deferred income taxes	22.0	--
Indebtedness	604.3	599.3
Other general account liabilities	602.1	595.1
Separate account and investment trust liabilities	5,354.5	5,564.9
Total liabilities	21,121.8	20,120.9
MINORITY INTEREST:		
Minority interest in net assets of subsidiaries	7.8	8.8
STOCKHOLDERS' EQUITY:		
Common stock, $0.01 par value, 1.0 billion **shares** authorized; 106.4 million **shares** issued	1.0	1.0
Treasury stock, at cost: 8.4 million and 4.5 million **shares**	(135.9)	(66.0)
Additional paid-in capital	2,410.4	2,410.4
Accumulated deficit	(185.2)	(30.8)
Accumulated other comprehensive income	121.3	81.1
Total stockholders' equity	2,211.6	2,395.7
Total liabilities, minority interest and stockholders' equity	$23,341.2	22,525.4

Certain reclassifications have been made to the 2001 financial statements to conform with the June 30, 2002 presentation.

Consolidated Statement of Income (in millions)

	Second Quarter 2002	Second Quarter 2001	Year-to-Date June 30, 2002	Year-to-Date June 30, 2001
REVENUES:				
Premiums	$259.4	$267.2	$ 516.8	$ 533.2
Insurance and investment product fees	145.9	139.7	286.2	285.2
Net investment income	215.7	225.7	446.9	393.9
Net realized investment losses	(28.6)	(4.9)	(63.6)	(20.5)
Total revenues	592.4	627.7	1,186.3	1,191.8
BENEFITS AND EXPENSES:				
Policy benefits	338.9	332.2	672.8	666.3
Policyholder dividends	107.5	89.7	181.7	196.0
Policy acquisition cost amortization	11.4	26.9	.5	62.0
Intangible asset amortization	7.8	11.3	15.9	24.5
Interest expense	7.7	7.7	15.4	14.8
Demutualization expenses	.6	8.8	1.5	19.5

Other operating expenses	179.1	140.2	315.1	377.6
Total benefits and expenses	653.0	616.8	1,202.9	1,360.7
Income (loss) before income taxes and minority interest	(60.6)	10.9	(16.6)	(168.9)
Applicable income tax (benefit) expense	(26.7)	5.2	(14.4)	(63.8)
Income (loss) before minority interest	(33.9)	5.7	(2.2)	(105.1)
Minority interest in net income of subsidiaries	3.3	1.7	6.1	3.5
Income (loss) before cumulative effect of accounting changes	(37.2)	4.0	(8.3)	(108.6)
Cumulative effect of accounting changes:				
Goodwill impairment	--	--	(130.3)	--
Securitized financial instruments	--	(20.5)	--	(20.5)
Venture capital partnerships and derivative financial instruments	--	--	--	(44.9)
Net loss	(37.2)	$(16.5)	$ (138.6)	$ (174.0)

Certain reclassifications have been made to the 2001 financial statements to conform with the second quarter 2002 presentation.

Reconciliation of Income Measures (in millions)

	Second Quarter 2002	Second Quarter 2001	Year-to-Date June 30, 2002	Year-to-Date June 30, 2001
GAAP Reported: Net Loss	$(37.2)	$(16.5)	$(138.6)	$(174.0)
Less: Net Realized Investment **Gains** (Losses), after tax	(10.7)(A)	(3.2)	(9.1)(A)	(13.4)
Less: Non-Recurring Items, after tax:				
Deferred Policy Acquisition Costs Adjustment	--	--	15.1	--
Expenses of Purchase of PXP Minority Interest	--	(2.9)	--	(46.7)
Early Retirement Pension Adjustment	--	.6	--	(11.3)
Management Restructuring Reserve	(21.8)	--	(21.8)	--
Demutualization Expense	(.6)	(12.1)	(1.2)	(19.0)
Other	--	2.4	--	2.4
Non-Recurring Items	(22.4)	(12.0)	(7.9)	(74.6)
Less: Cumulative Effect of Accounting Changes	--	(20.5)	(130.3)	(16.6)(B)
Operating Income (Loss)	(4.1)	19.2	8.7	(69.4)(C)
Less: Venture Capital, after tax	(19.4)	3.6	(22.7)	(82.4)
Add: Goodwill and Intangibles Amortization	8.3	14.3	17.9	27.5
Cash Operating Income, Excluding Venture Capital	$ 23.6	$ 29.9	$ 49.3	$ 40.5

(A) Net realized investment **gains** and losses are presented net of the related impact on the policyholder dividend obligation and deferred acquisition cost amortization for 2002.

(B) Excludes the cumulative effect of accounting change for venture capital partnerships. See (C) below.

(C) Includes the cumulative effect of accounting change for venture capital partnerships of $75 million (pre tax) as management considers this when evaluating the financial performance of the venture capital reporting segment.

Note: For additional information see our financial supplement.

Industry Codes/Names: BUS Business, General; BUSN Any type of business
File Segment: NW File 649

66/9/8 (Item 8 from file: 16)
09977197 **Supplier Number:** 90188470

PPR - $.0375 July Dividend.
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Document Type: Newswire ; Trade
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Business Editors

PHOENIX--(BUSINESS WIRE)--Aug. 7, 2002

ING Prime Rate Trust (NYSE: PPR), a diversified closed-end management investment company listed on the New York Stock Exchange, declared 3.75 cents per **share** monthly dividend on July 31, 2002 for the 31 days of July, payable on August 22, 2002 to shareholders of record on August 12, 2002. This represents the 171st consecutive monthly dividend since the Trust's inception in May 1988.

The following are annualized distribution rate calculations based on the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
July 31, 2002	$ .0375	6.38%	7.56%
June 28, 2002	$ .035	6.00%	6.76%
May 31, 2002	$ .0365	5.93%	6.42%
April 30, 2002	$ .0365	6.08%	6.57%
March 28, 2002	$ .0385	6.24%	6.57%

February 28, 2002	$ .0385	6.97%	7.41%
January 31, 2002	$ .041	6.61%	7.08%
December 21, 2001	$ .042	6.82%	7.45%
November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%
September 30, 2001	$ .047	7.61%	8.25%
August 31, 2001	$ .052	7.96%	8.11%

ING Prime Rate Trust was the first fund to invest in a portfolio of floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of capital.

The Trust is managed by ING Investments, LLC, and distributed by ING Funds distributor, Inc. The Trust and distributor are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE: ING), one of the world's leading financial services companies with operations in over 65 countries. The Trust's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact ING Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at Stacey.parker@ingfunds.com

Publisher Name: Business Wire
Company Names: *ING Group N.V.; ING Prime Rate Trust
Geographic Names: *4EUGE (Germany)
Industry Names: BUS (Business, General); BUSN (Any type of business)

66/9/9 (Item 9 from file: 15)
02510171 268142841
Mergers and acquisitions: Antitrust limitations on conduct before closing

Morse, M Howard
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Abstract:

In recent years, the Federal Trade Commission and Department of Justice have brought a number of antitrust enforcement actions challenging preclosure conduct by firms proposing mergers, acquisitions, and joint ventures. Recent cases have attacked covenants restricting activities pending closing of proposed transactions as well as initial efforts to integrate operations and even exchanges of confidential information among parties proposing to merge. The government is proceeding on theories that such conduct is illegal "gun-jumping" and price-fixing. This article outlines the legal framework for analyzing pre-closing conduct by parties proposing to merge, under the Hart-Scott-Rodino Act, the Sherman Act, and the Federal Trade Commission Act. It also describes the conduct at issue in recent enforcement actions. The aim is to shed light on what is black, what is white, and what is gray in this confusing area of the law and to help firms to avoid becoming the next "poster child" for government enforcers. The article concludes with practical guidelines for pre-consummation conduct.

Text:

In recent years, the Federal Trade Commission (FTC) and Department of Justice (DOJ) have brought a number of antitrust enforcement actions challenging preclosure conduct by firms proposing mergers, acquisitions, and joint ventures. Recent cases have attacked covenants restricting activities pending closing of proposed transactions as well as initial efforts to integrate operations and even exchanges of confidential information among parties proposing to merge. The government is proceeding on theories that such conduct is illegal "gun-jumping" and price-fixing. Federal officials have put the "fear of god" into merging entities through speeches raising the specter of even more aggressive enforcement actions. At the same time, there is tremendous pressure on business officials to make deals work by proceeding quickly to integrate operations and gain efficiencies from transactions.

This Article outlines the legal framework for analyzing pre-closing conduct by parties proposing to merge, under the Hart-Scott-Rodino Act,1 the Sherman Act,2 and the Federal Trade Commission Act.3 It also describes the conduct at issue in recent enforcement actions. The aim is to shed light on what is black, what is white, and what is gray in this confusing area of the law and to help firms to avoid becoming the next "poster child" for government enforcers. The Article concludes with practical guidelines for pre-consummation conduct.

THE HART-SCOTT-RODINo ACT

Corporate counselors should recognize that some pre-consummation coordination by merging firms may violate the Hart-Scott-Rodino Act and subject a firm and its officers and directors to civil penalties. The Act is procedural and applies whether or not a transaction raises substantive antitrust concerns.

THE STATUTE-PREMERGER NOTIFICATION

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, codified as

section 7A of the Clayton Act and known as the HSR Act, established a premerger notification and waiting period procedure.4 The aim of the statute is to provide the FTC and the Antitrust Division of the DOJ, which **share** antitrust enforcement authority, information about planned transactions and a proscribed time period in which to analyze those acquisitions before they are consummated.5
The statute provides that, if statutory thresholds for reportability are satisfied: "no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification ... and the waiting period ... has expired . . . ."6 Determining whether an HSR filing is required can be complex, with regulations issued under the statute filling more than fifty pages of the Code of Federal Regulations.7 Numerous formal interpretations and hundreds of informal interpretations have been issued over the last twenty-five years.8 Multi-volume treatises explain the details.9 Indeed, there are special rules for such situations as acquisitions of foreign assets or voting securities of a foreign issuer, limited liability companies, and secondary acquisitions.10 Specific rules govern such issues as how to value voting securities and assets to be acquired and the formation of joint ventures.11 There are exemptions ranging from acquisitions of goods and realty in the ordinary course of business, acquisitions of ten percent or less of an issuer's voting securities solely for the purpose of investment, and intraperson transactions, to acquisitions by gift, intestate succession, or irrevocable trust.12 In general, however, as a result of amendments to the Act in late 2000, today transactions valued over $50 million must be reported. 13 That threshold will be adjusted annually beginning in fiscal year 2005 for changes in the gross national product. 14

The government has explained that the purpose of the HSR Act is "to facilitate a prompt, thorough investigation of ... acquisitions, and [to] assure[] the enforcement agencies an opportunity to seek a preliminary injunction before the parties to an acquisition are legally free to consummate it, reducing the problem of unscrambling the assets after the transaction has taken place."15 Before the Act was passed, antitrust enforcers were often unaware of proposed transactions before they were consummated, litigation challenging transactions dragged on for years, remedies were often ineffective, and businesses had no assurance that their transactions would not be challenged years later.16

Today, when an acquisition is reportable, the HSR Act imposes an initial waiting period, which is typically thirty days, but is shorter for acquisitions in bankruptcy and for cash tender offers, and may be slightly longer when it would otherwise expire on a weekend or holiday 17 The waiting period is often terminated early when a transaction does not raise serious antitrust issues.18 On the other hand, transactions that may be anticompetitive may be delayed for months by issuance of a "request for additional information and documentary material," known as a "Second Request."19 Such a request, typically a complex set of interrogatories and document requests, prevents consummation of the transaction until after the parties submit all of the information and documentary material required by such a request or a statement of reasons for noncompliance.20

Failure to comply with the HSR Act may give rise to civil penalties of up to $11,000 per day "for each day" during which a person is in violation.21 Those fines may be imposed on a firm and its individual officers or directors who fail to comply with the Act.22

Because HSR violations are continuing violations, penalties assessed on a daily basis can quickly add up to substantial fines. Fines as high as $4 million have been imposed on a single company,23 and fines as high as $5.6 million have been imposed in connection with a single transaction.24 One

individual officer was fined

where the government found him personally culpable.25 On the other hand, the government generally has allowed "one bite of the apple" and has not sought civil penalties from companies that inadvertently fail to file and make a corrective filing as soon as the error is discovered, absent gross negligence by a sophisticated buyer that exercises a reckless disregard for its obligations under the Act.26

In addition to civil penalties, if any person fails "substantially to comply" with the premerger requirements, a court may order compliance, extend the preacquisition waiting period until there has been "substantial compliance," or grant "such other equitable relief as the court in its discretion determines necessary or appropriate.27

It is still an open question whether disgorgement-with even larger potential payments-is an appropriate remedy for violations of the HSR Act. The FTC has recently sought public comment on the use of disgorgement as a remedy for violations of the HSR Act, the FTC Act, and the Clayton Act.28 In doing so, the Commission said it was not re-examining the statutory authority to seek disgorgement in competition cases, but rather was soliciting comments on the factors the Commission should consider in applying this remedy and how disgorgement should be calculated,29 which suggests that the agency believes it has the authority to obtain disgorgement under the HSR Act.30 Nonetheless, while one district court decision has found that section 13(b) of the FTC Act vests the FTC with authority to seek disgorgement for violations of the FTC Act,31 no court has ever found that the HSR Act authorizes disgorgement. While the statute broadly authorizes "other equitable relief, "32 the fact that Congress expressly provided for a particular monetary remedy for a violation of the HSR Act may suggest that larger disgorgement payments should not be an available remedy.33

Notably, the FTC recently settled one lawsuit, FTC v. The Hearst Trust,34 obtaining $19 million in disgorgement of allegedly unlawfully earned **profits**, after asserting a violation of the HSR Act and challenging an acquisition on the merits

under section 13(b) of the FTC Act.35 The huge penalty should be a warning to potential violators of the HSR Act, but at the same time may not be too meaningful. The monetary recovery was to be distributed to injured customers as part of the settlement of a private class action suit alleging unlawful overcharges and may well have been available in the case even if there was no alleged HSR violation. At the same time, the government, in a suit filed by the DOJ, obtained $4 million in civil penalties for the HSR violation.36 The continuing controversy as to whether disgorgement should be obtained in this type of case is reflected in one FTC Commissioner's dissent, arguing "a substantially higher civil penalty" could probably have been obtained and would not offset private damages as the disgorgement relief actually did.37

Whether or not disgorgement will be available for HSR violations, potential civil penalties are substantial enough to encourage most companies to obey the law.31

THE REGULATIONS-FOCUS ON BENEFICIAL OWNERSHIP

Neither the HSR statute nor regulations issued to implement it define the term "acquire" which triggers the Act. Its meaning, however, is not altogether obvious in all situations.

In fact, nearly identical language='no person ... shall acquire, directly

or indirectly. . . ."-is in the substantive antitrust law Section 7 of the Clayton Act provides that

[n]o person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other **share** capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.39

Nonetheless, the two statutes are sometimes interpreted differently Thus, entering into an exclusive license is considered an acquisition under both statutes.40 On the other hand, entering into a multi-year operating lease with an option to purchase has been considered an acquisition for purposes of section 7, but is not reportable under the HSR Act.41

Regulations issued under the HSR Act impose filing obligations on "acquiring persons," defined as "[a] ny person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person.42 "Hold" in turn is defined to mean "beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means."43 Thus, any person that will be a beneficial owner as a result of an acquisition is an acquiring person. Reporting obligations under the statute are triggered by the planned transfer of beneficial ownership of voting securities or assets.

Although the regulations do not clarify the circumstances that give rise to beneficial ownership for HSR purposes, the government's "Statement of Basis and Purpose" accompanying initial issuance of the HSR rules, points to attributes of ownership:

the existence of beneficial ownership is to be determined in the context of particular cases with reference to the person or persons that enjoy the indicia of beneficial ownership, which include the right to obtain the benefit of any increase in value or dividends, the risk of loss of value, the right to vote the stock or to determine who may vote the stock, [and] the **investment discretion** (including the power to dispose of the stock).44

The concept of beneficial ownership for HSR purposes overlaps with, but is not identical to, the definition promulgated by the Securities and Exchange Commission (SEC) for purposes of section 13(d) of the Securities Exchange Act .45

Elsewhere, the "Statement of Basis and Purpose" makes clear reporting obligations may be triggered before a transaction is consummated: "The person or persons that have the benefits and risks of ownership of securities or assets 'hold'

those securities or assets, and persons that acquire beneficial ownership must report their 'acquisition' if the criteria of the act are satisfied."46 On the other hand, the Act applies to acquisitions, not to offers or agreements to acquire. Thus the "Statement of Basis and Purpose" states that "the completion or consummation or 'making' of an acquisition refers to the closing date, or the date on which title is transferred, rather than to the date on which a contract, agreement in principle or letter of intent is signed."47

ENFORCEMENT ACTIONS BASED ON PREMATURELY TRANSFERRING BENEFICIAL OWNERSHIP

The FTC and DOJ have brought a number of cases and have obtained civil penalties on allegations that acquisitions were improperly "consummated" prior to notification and expiration of the required waiting period by transferring "beneficial ownership."

In United States v. Atlantic Richfield Co.,48 for instance, the government obtained a $290,000 civil penalty from ARCO and $150,000 from Sunseeds Genetics, Inc. in connection with an acquisition by Sunseeds of ARCO's ARCO Seed subsidiary. ARCO had irrevocably granted the right to vote all of the subsidiary's **shares** to Sunseeds, before filing under HSR, although fifty-one percent of the **shares** were placed with an escrow agent. Moreover, Sunseeds obtained the right to obtain interim earnings on the **shares** held by the escrow agent at the expiration of the HSR waiting period. The FTC alleged that Sunseeds had thereby acquired beneficial ownership of all of ARCO Seeds' voting securities.

In another case involving ARCO, United States v. Atlantic Richfield Co.,49 the government obtained a $1 million civil penalty from ARCO and $1 million from Union Carbide in connection with an ARCO acquisition of assets from Union Carbide. ARCO had paid the full "non-refundable" $220 million purchase price to Union Carbide on the day the acquisition agreement was executed. Union Carbide was "required to operate the business in the ordinary course and in accordance with its existing business plan" until consummation, and ARCO "was required to cover liabilities from the continued operation" of the assets and would benefit from any **gains** during the waiting period.50 Under the terms of the acquisition agreement, if as a result of the HSR review, ARCO was prevented from acquiring the assets, a trustee would sell them with the **proceeds** paid to ARCO. The agencies rejected this apparent effort to shift antitrust risk to ARCO as a transfer of beneficial ownership, characterizing Union Carbide as only a "caretaker for ARCO," and arguing the companies had "effectively consummated the acqui

sition agreement by passing all benefits and risks of ownership to ARCO, thereby eliminating Union Carbide as an independent competitor."51

The agencies' position in these matters has been criticized. A leading American Bar Association (ABA) publication on the HSR Act, for instance, explains, 11 While the complaint [in ARCO/Union Carbide] sets forth a series of conditions which in the aggregate the agencies alleged to constitute a transfer of beneficial ownership, there is no indication, either in the complaint or in any other public statement, of which elements or combinations of elements alleged in the complaint were dispositive."52 The government continues to maintain that the transfer of beneficial ownership is to be determined in the context of particular cases, leaving uncertainty anytime some, but not all, of the various indicia of ownership are transferred.

ENFORCEMENT ACTIONS BASED ON OPERATIONAL CONTROL

It now appears that additional considerations beyond traditional concepts of beneficial ownership are relevant to HSR enforcement decisions, even if the agencies invoke "beneficial ownership" language in their actions. Thus, a firm that takes "possession" or "control" or has "influence over the direction of the business" to be acquired in a transaction or holds itself out to customers and the public as having combined before the expiration of the applicable waiting period may be alleged to violate the HSR Act. Because there are no litigated decisions to date, the precise scope of allowable conduct, however, remains unclear.

If the power to set prices, select customers, or specify product lines-that is, control over key competitive variables-is transferred from one company to another, such transfer of operational or managerial control would likely increase HSR exposure. That is true even though those characteristics may not enter into a traditional determination of beneficial ownership. Moreover, even though partial economic integration through contract-such as distribution arrangements, subcontracting, joint bidding, and the like-has not historically been viewed as an

acquisition of assets or voting securities within the meaning of the statute, such integration in connection with a merger before the expiration of the HSR waiting period may be viewed with suspicion and undergo close scrutiny

The DOJ has specifically articulated the position that "local marketing agreements" (LMAs) or "time brokerage agreements," by which radio station owners/ licensees transfer the right to sell advertising and arrange programming, entered into in connection with an acquisition, "may prematurely transfer beneficial ownership" and require an HSR filing.53 The agencies recognize that LMAs "outside the context of an acquisition" are analogous to management contracts and would not violate the HSR Act.54 The agencies reason that when such an LMA expires, the station owner may operate the station himself or enter into an LMA with someone else. An LMA entered into in connection with an acquisition, however, "transfers operating control of the assets or business before expiration of the HSR waiting period."55

The FTC and DOJ have, in recent years, challenged companies acquiring possession and operational control of assets covered by reportable transactions before expiration of the HSR waiting period as transferring beneficial ownership of those assets.

The first such case was United States v. Titan Wheel International, Inc.56 There, the government obtained a $130,000 civil penalty when Titan Wheel took control of assets before obtaining HSR clearance, despite the fact that the transaction posed no apparent antitrust issues and was cleared within days of filing. The asset purchase agreement at issue transferred control of one Pirelli Armstrong Tire Corporation agricultural tire plant, including inventory, machinery, equipment, and customer and supplier lists to Titan immediately. Alleging that the companies had transferred "possession and operational control," with the effect of "transferring beneficial ownership," the government insisted upon the maximum civil penalty in the case even though the transfer was subject to unwinding in the event the acquisition was not consummated.57

In 1998, in United States v. Input/Output,58 the buyer and seller each agreed to pay a $225,000 civil penalty to resolve charges that they failed to observe the HSR waiting period. The FTC alleged that the firms effectively jumped the gun, by allowing the acquiring firm to exercise operational control before the HSR waiting period had expired. The FTC alleged that the companies integrated their personnel and operations and held out the company as integrated to the public. Specific conduct identified in the government's complaint included:

* The acquiring firm circulated an internal memorandum announcing a reorganization, effective immediately, which assigned personnel of the acquired firm to positions within the company.

* Personnel of the acquired firm moved into the acquiring firm's offices, received e-mail addresses and access to the acquiring firm's internal reports, and were given business cards with titles in the acquiring firm which were distributed to customers.

* Phones in the acquired firm's offices were answered under the acquiring firm's name.

* The president of the acquired firm traveled on behalf of the acquiring firm to resolve a commercial dispute with a customer, and was consulted and asked to review and comment upon the possible acquisition by the acquiring firm of another company.59
Explaining the case at the time, the FTC Bureau of Competition Director said:

signing the contract transfers some indicia of beneficial ownership. By itself, that transfer is entirely lawful. But the transfer of additional indicia of ownership during the waiting period-such as assuming control through management contracts, integrating operations, joint decision making, or transferring confidential business information for purposes other than due diligence inquiries-are inconsistent with the purposes of the HSR Act and will constitute a violation.60

It is now clear that it is the government's position, at least, that merging firms shifting control through management contracts and integrating operations before the expiration of the HSR waiting period, when an acquisition is contemplated, will be considered an HSR violation. The suggestion that transferring confidential business information by itself may violate the HSR Act seems to be on particularly shaky ground, and no enforcement action has been based on exchange of confidential information without much more questionable conduct.

Most recently, in September 2001, in United States v. Computer Associates International, Inc. 61 the DOJ alleged violations of both the Hart-Scott-Rodino Act for "gun-jumping" and the Sherman Act for price fixing based upon covenants in a merger agreement between Computer Associates International, Inc. (CA) and Platinum technology International, inc. (Platinum) and conduct by the companies before closing.62

The DOJ specifically alleged the merger agreement "prevented Platinum from undertaking certain competitive activities during the HSR waiting period without

CA's approval, including determining the prices and terms it would offer to its customers."63 The HSR gun jumping count alleged that CA "exercised unlawful control" over Platinum by:

* installing CA employees at Platinum headquarters to review and approve contracts;

* restricting Platinum's rights to grant discounts without approval;

* limiting Platinum's rights to negotiate contract terms without approval;

* limiting Platinum's rights to enter into fixed-price contracts;

* limiting rights to offer certain services without approval;

* collecting and disseminating competitively sensitive information; and
* making day-to-day management decisions, including decisions relating to recognition of revenue and participation at industry trade shows.64

The actions challenged in this matter, unlike the previous enforcement actions, arguably did not involve steps aimed at taking control over the business to be acquired, but rather were actions aimed at preserving the value of the business to be acquired. Nonetheless, the actions gave CA

substantial control over key competitive aspects of Platinum's business.

CA issued a press release in response to the DOJ complaint, arguing its actions were "consistent with the law" and were "essential in order to protect the assets" of Platinum.[65] CA also noted that the provisions were virtually identical to provisions used in previous acquisitions.[66] Nonetheless, in April 2002, CA agreed to pay $638,000, approximately half of the maximum civil penalty, to resolve the alleged HSR violation. In a "Competitive Impact Statement," the DOJ explained its view that merging parties must remain "separate and independent economic entities" and "an acquiring person may not, after signing a merger agreement, exercise operational or management control of the to-be-acquired person's business."[67] The DOJ further clarified that "ordinary course" covenants requiring companies to operate businesses in the ordinary course do not violate the HSR Act. Indeed DOJ advised that "customary provisions" restricting business actions "reasonable and necessary" to protect the value of a transaction, such as limits on declaring dividends, issuing securities, amending organizational documents, making acquisitions, mortgaging property, making tax elections, discharging liabilities outside the ordinary course, and commencing lawsuits other than routine collection of bills, were not considered HSR violations. Restrictions on "new large capital expenditures" were also considered customary.[68]

In light of this enforcement action, businesses should be advised that antitrust counsel ought to review covenants in merger and acquisition agreements restricting conduct pending closing if those covenants go beyond general restrictions limiting the acquired firm to operating its business "in the ordinary course of business."[69] One possible course of action may be to turn restrictive covenants into conditions precedent to closing that give a buyer the right to "walk" rather than consummate the transaction, but which do not restrict the conduct of the business pending closing. Such an approach leaves the decision whether to abide by such restrictions in the seller's hands, and thus should avoid any HSR violation while still allowing the buyer the right not to consummate the transaction, and perhaps to obtain a break-up fee or liquidated damages, if it determines that the value of the business has deteriorated as a result.

INFORMATION EXCHANGE

One of the gray areas in the law is whether the mere exchange of information for purposes of planning integration may violate the HSR Act. FTC officials have suggested that exchanging confidential information before the expiration of the HSR waiting period may violate the HSR Act as an exercise of control.

One Director of the FTC Bureau of Competition took the controversial position in a 1998 speech that:

When to-be-acquired firms release information that goes beyond due diligence because they are told to do so by their future bosses, they and their bosses are jumping the starting gun that is supposed to be triggered by the expiration of the waiting period .... While parties have argued that their intent was merely to plan integration rather than to implement it, we do not think this distinction meets the requirements of the Act .... Absent special circumstances, we consider that the release of information violates the HSR Act even when the acquired firm maintains its release is voluntary, unless the acquired firm can show that it would have provided such information to a firm other than the acquiring firm.[70]

The government has expressed concern that release of confidential business information to the buyer can prejudice antitrust relief, even when a

consent order requires divestiture of only a single product. The government is also concerned that information that is exchanged for the purpose of planning can also increase interim competitive harm. Officials have suggested, for example, that the existence of a corporate integration plan can induce critical employees to leave during the waiting period, and thereby lessen competition. This argument, however, ignores the fact that uncertainty from the absence of an integration plan can also cause critical employees to find other jobs. According to FTC officials, the agency has at times even obtained agreements from parties to cease exchanging information and to return all documents containing confidential business information that

was not being used either for due diligence or for negotiating a consent order with the Commission.71

Notably, information exchange allegations were among the elements of control alleged in Input/Output and Computer Associates, discussed above. It seems doubtful that exchange of information by itself for purposes of planning integration, if undertaken subject to confidentiality restrictions, would support an action for civil penalties under the Act.72 Indeed, in its "Competitive Impact Statement" in Computer Associates, DOJ noted CA obtained Platinum's competitively sensitive information, emphasizing it did so "without any restrictions as to its use or its dissemination within CA."73 Nonetheless, until repudiated, the government speeches will continue to create uncertainty in this field.
A final note of caution with respect to the HSR Act bears repeating, That Act is procedural and applies to premerger consolidation even when merging parties are not competitors or a transaction does not raise substantive concerns. Where a transaction does raise substantive concerns, pre-consummation activities that are regarded as inappropriate are likely to complicate efforts to obtain agency clearance to complete the transaction.

THE SHERMAN ACT AND FTC ACTS

Pre-consummation conduct must also be examined under the lens of the Sherman Act and FTC Act as they bring different limitations into play Section 1 of the Sherman Act makes illegal every "contract, combination ... or conspiracy in restraint of trade,"74 and the Federal Trade Commission Act prohibits "unfair methods of competition."75

The limitations under these statutes apply whether or not an acquisition is reportable under the HSR Act, and even after expiration of the HSR waiting period, until the transaction is consummated.

PREMERGER COORDINATION

The DOJ has plainly taken the position that "the pendency of a proposed merger does not excuse the merging parties of their obligations to compete independently"76 Thus, the DOJ asserts, activities by one party to control or affect decisions of another with regard to price, output or other competitive variable may violate the Sherman Act.77 FTC Bureau of Competition officials have similarly

asserted that "between the time two competitors agree to merge and when they consummate their transaction, they are separate economic actors who are bound by the competition laws."78 Thus, until consummation, naked price fixing agreements, agreements to limit output, allocate customers, divide markets, and similar agreements between competitors or potential competitors are-in the government's view-per se illegal.79

The case law is a bit less clear. In International Travel Arrangers v. NWA,

Inc.,80 the U.S. Court of Appeals for the Eighth Circuit upheld a jury instruction that merging parties are incapable of a Sherman Act conspiracy if the jury decided the merging parties "lacked [the] independent economic consciousness after they had decided to merge and before the merger was completed."81 The court rejected the view that "only the formal consummation of a merger precludes the application of section I of the Sherman Act to an alleged conspiracy between the merging companies."82 The court reasoned that while the firms' interests were previously divergent, "that situation completely changed once the merger was agreed upon."83

Under Supreme Court precedent, the only clear role is that a firm cannot be found to conspire with its wholly-owned subsidiary.84 The Court's reasoning only protects firms that have a "complete unity of interest."85 The Court's reasoning is that because a parent may assert full control at any moment if its subsidiary fails to act in its best interest, a parent and its wholly-owned subsidiary always have the unity of purpose or common design that underlies a section 1 agreement, and the idea of an agreement in Sherman Act terms therefore lacks meaning.86 That reasoning is arguably not applicable before consummation.

The FTC has brought two enforcement actions to date on the theory that companies must continue to compete up until closing, both of which were settled. In 1991, in In re Torrington Co.,87 the FTC accepted a consent order, resolving charges challenging premerger coordination between Torrington and Universal Bearings, Inc. during the pendency of an HSR investigation.

Torrington and Universal abandoned their proposed merger after the Commission voted to challenge it. In the interim, however, the president of Universal, knowing that Torrington planned to consolidate production of axle shafts in a Torrington plant after consummation of the proposed merger, told customers that they should purchase product from Torrington and refused to quote to them.

Universal believed that sending customers to Torrington would "speed up" the consolidation and "keep the business in the family. "88

The FTC charged that Torrington and Universal engaged in per se illegal customer allocation. The FTC Consent Order was narrowly tailored to limit activity in connection with future acquisitions in the same market, prohibiting "directing, implementing or otherwise providing for any consolidation of the business or assets... to be acquired and the acquiring person prior to the consummation of the proposed acquisition."89

The FTC followed the Torrington case in 1998, when it charged a title company with violating section 5 of the FTC Act by entering agreements with customers setting prices, terms, and conditions for title services to be "jointly provided" by the title company and a prospective joint venture partner, "pending formation of a joint title plant entity."90 The FTC alleged that the effect of that conduct was to increase prices and restrict output in the market, and that the conduct constituted a "combination, agreement, or understanding between competitors to raise, fix, and maintain the price, terms and conditions of compensation paid for title plant services."91

Most recently, in the Computer Associates matter discussed above, the DOJ alleged a violation of the Sherman Act as well as the Hart-Scott-Rodino Act.92 The Sherman Act price fixing count was based primarily on allegations that CA and Platinum agreed that Platinum would not offer its customers discounts greater than twenty percent off list price unless CA agreed in writing to a larger discount.

The central focus of the DOJ's complaint was "conduct of business" covenants that the DOJ maintained are not normally found in merger agreements and severely restricted Platinum's ability to engage in business as a competitive entity independent of CA's control.93 The DOJ did not object to a merger covenant that required Platinum to carry on its business "in the ordinary course in substantially the same manner as heretofore conducted."94 But the DOJ did object to merger agreement provisions that prohibited discounts, limited customer contracts to an agreed-upon "standard" contract, prohibited long-term service contracts at fixed prices, and barred Platinum from offering certain specific services, without CA's permission.95

The DOJ alleged that Platinum modified its ordinary discounting and contracting practices and CA installed one of its vice presidents at Platinum's headquarters to review and approve customer contracts. The DOJ also alleged that CA made day-to-day management decisions for Platinum, including how the company rec

ognized revenue, and "reviewed competitively sensitive information about Platinum's customers and business strategy."96 The DOJ reasoned that the limitation on Platinum's right to set price and the actions to effectuate that agreement were "extraordinary and not reasonably ancillary to any legitimate goal."97

In April 2002, CA agreed to resolve the DOJ Sherman Act charges by entering into a consent order. That order will prohibit CA in future acquisitions from agreeing on prices, approving customer contracts, and misusing competitively sensitive bid information. The order will, however, allow CA to:

*agree with firms to be acquired to continue to operate in the ordinary course of business consistent with past practice;

*condition transactions on a requirement that the to-be-acquired firm not engage in conduct that would cause a material adverse change;

*conduct reasonable and customary due diligence; and

*agree on price in buyer/seller transactions and to submit joint bids where such agreements would be lawful in the absence of the proposed transaction.98

The consent order is quite explicit that in conducting due diligence, pending bid information may only be obtained from a competitor: (1) to the extent bids are material to understanding future earnings and prospects, and (2) pursuant to a non-disclosure agreement that limits use of the information, and (3) prohibits disclosure to employees directly involved in the marketing, pricing or sales of the competing business.99 With respect to non-material bids, DOJ suggests firms must use an independent agent to collect information and present it in an aggregated or other form that shields customer specific and other competitively-- sensitive information. 100

The DOJ order curiously is limited to restricting conduct between signing of an acquisition agreement and the earlier of (1) expiration or termination of the HSR waiting period or (2) closing of the transaction.101 Since the Sherman Act restrictions are independent of the HSR Act, firms should nonetheless be advised not to fix prices even after termination of the HSR waiting period.

While CA might have defended the DOJ suit on the grounds that (1) merging firms are not independent actors, and (2) the agreement should be analyzed

under the rule of reason because it was intended to preserve the business to be bought, was ancillary to the acquisition agreement, and was not a naked agreement to limit price competition, the government's position makes entering into similar agreements risky. Ad hoc agreements, such as that in Torrington, face even greater risk because it is difficult to characterize them as ancillary to the acquisition agreement.
In light of the Computer Associates enforcement action, as noted above, covenants in merger agreements beyond general restrictions limiting the acquired firm to business in the ordinary course or prohibiting material changes in operations should be scrutinized by antitrust counsel. In particular, counsel should be aware that price fixing charges may be brought based on covenants that restrict the acquired firm's ability to discount prices or require the acquiring firm to approve agreements by the acquired firm with respect to products or services where the firms compete.

PREMERGER EXCHANGES OF INFORMATION

Antitrust officials have articulated several concerns arising from exchange of information among firms during merger and acquisition negotiations, due diligence, and integration planning. Those concerns can be put into three broad categories: (1) sham merger negotiations may be used to exchange confidential commercial information or otherwise coordinate activities anti-competitively; (2) one firm may enter into negotiations to obtain confidential information for predatory purposes even if the other firm enters negotiations in good faith; and (3) exchange of information during the course of legitimate merger discussions may lead to coordinated interaction, or lead a firm that obtains information to raise prices, knowing for example that it did not need to price so low to win business. 102 These concerns may arise during the pre-consummation period or afterwards if the transaction is abandoned or blocked, or a business is divested.

It is not difficult to understand the reasoning of the first case, involving sham merger negotiations designed to cover an illicit information exchange. Proving such a case, however, is likely to be difficult in practice. Similarly the second case, where one firm uses sham negotiations to obtain confidential information of a competitor, may be predatory, at least if that firm has monopoly power.103 It is the third case, which raises the most common concern and requires balancing of legitimate business justifications and potential anticompetitive effects under the rule of reason, that is most challenging.

The Enforcement Debate

FTC officials in the early 1990s gave a number of speeches suggesting information exchanges during the course of merger negotiations should be limited for

the reasons discussed above.104 The position was widely criticized.105 Assistant Attorney General James Rill, for instance, said he

would be very concerned about overreaching in that area ... [unless] we had proof that the whole deal was a sham .... But again, because of the downside risk of overreaching, we would have to be quite convinced that there was evidence that the activity was other than honestly industrial before we would take an interest in it. 106

It has also been argued that enforcement against legitimate information exchanges may chill the market for corporate control, which must operate efficiently to restructure and keep U.S. industries competitive. 107

The Case Law

Supreme Court precedents recognize that information exchanges can be used by firms as a facilitating practice, which makes coordinated interaction more likely. Under these precedents, exchanges of information must be judged under the rule of reason. An information exchange will be allowed where there is a legitimate business justification and neither its purpose nor effect is to stabilize prices.

In United States v Container Corp. of America, the Court held that continuous and ongoing exchanges of recent sales prices among manufacturers of corrugated containers was unlawful. 108 The Court reasoned that the industry was highly concentrated and the exchange had the effect of stabilizing prices and "chilling the vigor of price competition."109 Subsequently, in United States v. United States Gypsum Co., the Supreme Court reasoned that the "exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."110 The Court held that "the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication."111

Considerations Under the Rule of Reason

There are two legitimate business justifications for exchange of information among firms contemplating a merger or acquisition that must be taken into account under the "rule of reason": (1) legitimate due diligence, i.e. evaluating the seller's business in order to determine a purchase price and confirm that valuation, and (2) planning efficient integration of the firms after consummation. Some have argued that information exchanges should be allowed where "reasonably necessary" to value the transaction or to effect an orderly transition, as long as appropriate security and confidentiality is afforded the information. 112 The problem for corporate counselors is that there are few bright lines under the rule of reason, only a balance of procompetitive justification and anticompetitive risks.

The structure of the industry has to be a key factor in a rule of reason analysis. 113 Coordinated interaction is likely to be a greater concern in highly concentrated markets with high entry barriers, otherwise susceptible to collusion. These factors are similar to those analyzed in determining whether the proposed transaction is itself anticompetitive, and therefore information exchanges should not present serious concerns where the underlying transaction is approved. Logic therefore suggests that information exchanges should present the greatest concern when undertaken with respect to aspects of transactions ultimately challenged as likely to lessen competition or when merger negotiations break down and proposed transactions are abandoned.

Similarly, the type of information exchanged should be an important consideration in the analysis.114 Current and future information is more likely to be problematic than historical information. Customer specific pricing, cost, and margin information are often the most sensitive, though what information is competitively significant often varies by industry. Customer identity, product development plans, and trade secrets may be sensitive in some industries, while in others price information may be widely known and will not be sensitive. Wherever sensitive information is exchanged, there should be a demonstrable need for the information.

Precautions or safeguards adopted to prevent unlawful collusion should also be relevant to the rule of reason analysis. 115 The recent Computer Associates consent offers guidance with respect to the most sensitive

information, pending bid information. As the DOJ explained in its "Competitive Impact Statement," antitrust exposure can be limited by operating under a confidentiality agreement restricting distribution and use of information. 116 Access to sensitive confidential information might be provided only to planning staff or executives involved in negotiating or approving the transaction, non-operational people, and outside advisers, restricting operational personnel in competing businesses from access to sensitive information. Limiting the most sensitive information only to outside consultants, accountants or attorneys, who aggregate customer specific and product specific data before providing it to company officials, may be the safest approach. Limiting exchanges of the most sensitive information until late in the due diligence process when a transaction is more certain may also at times be a reasonable accommodation of competitive concerns and legitimate needs for information.117

Any confidentiality agreement should provide that confidential information should not be used for any purpose other than in relation to the transaction itself,118 and should also provide that documents should be returned or destroyed if the merger is not consummated. Confidentiality agreements may create a "firewall" between individuals authorized to review information and others that have operational responsibility in the event that the transaction is not consummated or the subject business is divested.

In most transactions, due diligence information should flow from seller to buyer, but not from buyer to seller. Mutual exchanges of information warrant more scrutiny than one-way provisions of information. Unless the transaction is structured so that part of the consideration is stock of the acquiring company or as a merger in which shareholders of both companies will obtain an interest in the combined company, the flow of information should be one-way Similarly, repeated exchanges of information are more likely to be questioned than onetime exchanges.119

After a deal is valued and agreed to in principle, there is likely less justification for the exchange of due diligence information, though some exchange may still be reasonably necessary to assure that assets are not wasted and the target is continuing to operate in the normal course. Antitrust risk, however, can be minimized by considering these issues in advance, and establishing procedures for revaluing the transaction, using independent consultants to monitor events during the intervening period.120

Integration planning may provide a valid rationale for continuing exchanges of confidential information, especially regarding such topics as information technology or accounting systems and human resources, which are essential to integration and raise little competitive concern. Despite pressures on business officials

to speed up the consolidation, integration planning is less likely to be as convincing a rationale for exchanging competitively sensitive information as due diligence, particularly if the integration can be delayed at minimal cost. While unilateral integration planning should be uninhibited, exchange of information with respect to how manufacturing facilities will be rationalized, which products may be dropped or repositioned, and how products will be priced is likely to be most sensitive. Nonetheless, with precautions restricting use and access to information, integration planning should be permissible.121

In sum, standards for allowable information exchange are not black and white, but rather vary according to market conditions, the sensitivity of the information to be exchanged, safeguards adopted, and the need for the information.

Recent Enforcement Action

After talking about information exchange issues for years, in 1998, in In re Insilco Corp.,122 the FTC charged that the transfer of competitively sensitive information about customers, prices and costs, between firms proposing to merge, in advance of the purchase, was likely to lessen competition in the highly concentrated markets at issue and violated the FTC Act. Notably, the underlying transaction at issue was not reportable under the HSR Act and the FTC required a post-consummation divestiture. At the same time, the FTC alleged that:
[p]rior to the consummation . . . , Insilco requested and received ... NonAggregated, Customer-Specific Information all of which is the type of information that would likely have been detrimental to competition in the relevant markets if the Acquisition had not been consummated .... [including] descriptions of prior customer negotiations; detailed customer-by-customer price quotes; current pricing policies and strategies; and detailed, customer-- by-customer future pricing strategies.123

The FTC alleged that, but for the acquisition, such information exchange "may have detrimentally affected competition .... ."124

The FTC "Analysis of Proposed Consent Order to Aid Public Comment" in Insilco reveals that the information exchanged in that matter included "current and future pricing plans" and "price formulas."125 Significantly, there was no indication that the information was exchanged pursuant to a confidentiality agreement. Moreover, the Commission took the position that the information transfer was "particularly harmful" because the affected markets were duopolies, emphasizing that "the transfer of such competitively-sensitive information in such highly concentrated markets violates Section 5."126 On the other hand, the "Analysis of

Proposed Consent Order to Aid Public Comment" surprisingly asserts that the exchange of such information would "likely harm competition in any market. 11127
Under the FTC consent order, Insilco is prohibited from obtaining or providing, without specific safeguards:

* customer-specific price and cost information;

* current or future pricing plans; or

* current or future strategies or policies relating to competition; and

* analyses or formulas used to determine costs or prices

absent aggregation, for twenty years in connection with acquisitions of firms competing in the relevant markets, and for ten years in connection with acquisitions of firms competing in any markets in which Insilco competes, The order specifically allows the exchange of information to an "independent agent" not regularly employed by the company that does not have responsibility for pricing, who can then provide aggregated information to the company. 128

The DOJ allegations in Computer Associates, discussed above, include claims CA reviewed competitively sensitive information about Platinum's customers and business strategy though it appears those allegations support the price fixing charges and not an independent claim that the exchange of information was unlawful.129
Certainly, what is permissible in terms of information exchange remains a large gray area, requiring counsel to balance due diligence and integration planning justifications against potential anticompetitive concerns on a

case-by-case basis.

PRACTICAL GUIDELINES FOR PRE-CONSUMMATION CONDUCT

The following general guidelines for pre-consummation conduct identify both prohibited and permissible conduct. The guidelines, which leave a large gray zone, is based upon both the recent case law and agency pronouncements discussed above.

The general rule is that companies must remain separate and independent until closing. Integration planning is permitted, subject to limits on exchange of information. Transition teams may collaborate on developing plans for post-closing integration of operations. Actual integration, coordination of business operations,

and direction of, oversight over, or involvement in the other firm's business affairs, however, is prohibited.

PROHIBITED CONDUCT

1. Do not coordinate pre-consummation activities. Do not direct or participate in day-to-day decision-making about the other firm's business affairs. Do not take possession or control of any assets or businesses of the other firm.

2. Do not hold out employees of one firm as being with the other to customers or the public. Do not use new business cards, answer telephones by reference to other company, or use one company's logo with the other company's products or literature. Do not relocate employees, give employees of one firm office space in other's facilities, or have employees of one firm report to employees of the other.

3. Do not accept or provide information that is not reasonably necessary for legitimate due diligence or integration planning purposes. Shield or aggregate competitively sensitive information.

4. Merging firms should not:

* discuss or exchange information regarding customers, distributors, pricing policies, pricing formulas, prices or other terms of sale, business or marketing plans, bidding or other sales solicitation activities, costs or cost structures, **profit** margins, profitability targets, proprietary technologies, pending or planned research and development (RED) or product development efforts, except as provided below.
* agree on, coordinate, or otherwise discuss past, present or planned competition between them, outstanding or prospective competitive bids, pricing, discounts or other terms under which either company might offer its products or services in competition against the other company.

* agree on, coordinate, or otherwise discuss current product development efforts.

5. Examples of the above rule include: no agreement that only one company will compete for business when both normally might do so; no agreement on the price or other terms either company may offer customers; no agreement or discussion regarding either company's withdrawal or change in any outstanding bid; no agreement or discussion regarding either company's changing the manner it is now servicing or dealing with any existing customer; and no agreement or discussion regarding current product development efforts.

6. Personnel should not disclose to personnel of the other company

proprietary information that would not ordinarily be disclosed to the public or to the other company (e.g., pricing and other commercial terms, costs, development plans, customer lists, marketing intentions, and business plans), except through designated due diligence and transition teams subject to confidentiality strictures.
7. Even after all regulatory clearances are obtained, there should be no agreement or understanding with regard to price or customers to be served, until after closing.

PERMISSIBLE CONDUCT

1. Due diligence and transition teams may exchange information required for legitimate purposes subject to confidentiality strictures, using of independent consultants to aggregate competitively sensitive information or a "clean team."

2. Transition teams may collaborate on developing plans for post-closing integration of operations. This may include collection of otherwise prohibited information for the purpose of making decisions about immediate post-closing plans, including:

* evaluation of employees for purpose of making decisions regarding postclosing personnel assignments, combined staffing needs and related matters, and communications about post-merger employment prospects, staffing arrangements, and related matters;

* evaluation of facilities, equipment, information and other operational systems, distribution arrangements, and products for purposes of planning post-merger consolidation;
* evaluation of environmental and other existing liabilities, employee benefits, tax and other financial or related aspects of the business for purposes of planning post-merger corporate organization, and related matters.

3. Personnel may jointly or separately meet with customers for purposes of (a) introduction; (b) generally explaining the contemplated transaction; (c) discussing post-closing plans; and (d) otherwise explaining how the transaction may benefit customers. On the other hand, it is not okay to make joint calls on customers to sell products or services.

4. More flexibility and broader areas of information exchange for purposes of integration planning may be permissible with regard to parts of the business as to which there is no existing or prospective competition between the firms or no impact on consumers in the United States.

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Business Editors

ING Prime Rate Trust (NYSE: PPR), a diversified closed-end management investment company listed on the New York Stock Exchange, declared 3.5 cents per **share** monthly dividend on June 28, 2002 for the 30 days of June, payable on July 22, 2002 to shareholders of record on July 10, 2002. This represents the 170th consecutive monthly dividend since the Trust's inception in May 1988.

The following are annualized distribution rate calculations based on the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
June 28, 2002	$ .035	6.00%	6.76%
May 31, 2002	$ .0365	5.93%	6.42%
April 30, 2002	$ .0365	6.08%	6.57%
March 28, 2002	$ .0385	6.24%	6.57%
February 28, 2002	$ .0385	6.97%	7.41%
January 31, 2002	$ .041	6.61%	7.08%
December 21, 2001	$ .042	6.82%	7.45%
November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%
September 30, 2001	$ .047	7.61%	8.25%
August 31, 2001	$ .052	7.96%	8.11%
July 31, 2001	$ .054	8.19%	8.43%

ING Prime Rate Trust was the first fund to invest in a portfolio of floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of capital.

The Trust is managed by ING Investments, LLC, and distributed by ING Funds distributor, Inc. The Trust and distributor are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE: ING), one of the world's leading financial services companies with operations in over 65 countries. The Trust's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number

of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact ING Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at Stacey.parker@ingfunds.com.

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Abstract:

The Polish banking sector is characterized by a long-term move away from state ownership and a general tendency towards consolidation. Underlining the move toward consolidation is the fact that of the 71 banks now operating, the largest 13 account for over 80% of total assets. Moreover, the stability of the sector is underlined by the fact that 2 of the 13 are directly controlled by the Treasury, with the shareholders of the rest being well-established foreign banks enjoying high credit ratings. Hand in hand with long-term privatization and consolidation come efforts to streamline and modernize banking operations, both through legislation and commercial action.

Text:

MARKET STRUCTURE AND TRENDS

The Polish banking sector is characterized by a long-term move away from state ownership and a general tendency towards consolidation. In 2001 the three banks directly controlled by the Treasury accounted for 27% of deposits from non-financial customers, 21% of total assets, and just 11% of capital funds, whereas foreign-controlled banks had respective figures of 64% of deposits, 69% of total assets and 80% of capital funds.

Underlining the move toward consolidation is the fact that of the 71 banks now operating, the largest 13 account for over 80% of total assets. Moreover, the stability of the sector is underlined by the fact that two of the 13 are directly controlled by the Treasury, with the shareholders of the rest being wellestablished foreign banks enjoying high credit ratings.

Hand in hand with long-term privatization and consolidation come efforts to streamline and modernize banking operations, both through legislation and commercial action. Bank employee numbers continue to fall in a drive to cut costs, and electronic banking services are developing, with 15 banks now offering such services.

THE MAIN REGULATORY BODIES AND THEIR POWERS

The Polish Central Bank is the supervisory authority charged with regulating banking activity by way of the Banking Supervision Commission (BSC), which derives its powers from the Law on the National Bank of Poland. Its primary duties are:

* granting consents for the establishment of banks, branches or representative offices of foreign banks and consents for execution of voting rights from large blocks of **shares**;

* suspending operations of banks whose balance sheets show insufficient funds to meet obligations;

* suspending the members of a bank's management board, and imposing financial penalties on members of the management board of a bank in cases which include, for example, failure to carry out recommendations of the BSC relating to conduct of activity in violation of law;

* liquidation of banks.

The Securities and Exchange Commission (SEC) is the regulatory body supervising capital markets and the public trading of securities in Poland. The main purpose of the SEC is supervision of fair trade and competition in the public trading of securities and ensuring public access to reliable information concerning the securities market. In general, the duty of the SEC is to undertake all activities necessary to ensure efficient functioning of the capital markets and the protection of investors. The SEC enjoys very broad powers which include consents for the introduction of securities to public trading and for acquisitions of **shares** resulting in breaching the threshold of 25%, 33% or 50% of the voting rights of publicly traded companies. SEC permits are required for the conduct of activity by investment funds and brokerage houses. The SEC also has the right to order securities to be withdrawn from public trading or to impose financial penalties up to PLN500,000 ($125,000) on brokerage houses, issuers and other entities that introduce securities to public trading.

The regulatory body that supervises the activity of insurance companies and pension funds is the Commission for Insurance and Pension Fund Supervision (Insurance Commission). This newly-- established body, born of the merger between the Office for Pension Fund Supervision and the State Office for Insurance Supervision, became operational on Aril 1 2002. The main duty of the Insurance Commission is supervising the activity of insurance companies and pension funds so as to protect the interests of pension fund members

and insured persons. The Insurance Commission also gives its opinion on issuing permits for conducting insurance activity, confirms agreements on transfers of insurance portfolios, issues permits for establishing pension funds and issues permits for acquiring and subscribing for **shares** in pension funds.

TYPES OF FINANCIAL INSTITUTIONS, KEY LEGISLATION AND REGULATORY DEVELOPMENTS

Banks

The activities of banks are regulated by the Banking Law Act and Foreign Exchange Law Act. In addition, banks are also obliged to comply with resolutions of the BSC and Ordinances of the Minister of Finance.

A bank is a legal entity, the exclusive object of business of which is:

* receiving cash deposits payable on request or within due time limits and operating the accounts of such deposits;

* operating orner anK accounts;

* granting credits;

* giving and confirming bank guarantees and opening letters of credit;

* issuing bank securities;

* making bank financial settlements;

* issuing, settling and redemption of electronic money.

Moreover, banks may, on the basis of authorization of the President of the National Bank of Poland, perform certain foreign exchange operations and make certain settlements connected therewith. The Law provides for several types of banks: states banks, cooperative banks and commercial banks, with the latter being dealt with in greater detail later in this text.

Investment funds

The activities of investment funds are regulated in the Law on Investment Funds. An investment fund is a legal entity, the exclusive object of business of which is investing money, collected publicly or privately, in securities and other property rights. The only investment purpose of a fund may be the protection of the real value of the fund's assets, obtaining **profits** from investments or increasing the value of the fund's assets, as a result of an increase in the value of investments. The Law provides for several types of investment funds (open-end, specialized open-end, close-end, specialized close-end, mixed), which differ in, for example, the entities that may become participants in the fund, the manner of participation and the **discretion** over **investment**.

Pension funds

The other financial institutions active on the Polish market since January 1 1998 are pension funds. The activities of pension funds are governed by the Law on Organisation and Functioning of Pension Funds. In light of the Law, a pension fund is a legal entity, whose object of business activity is the gathering of money with a view to making investments in order to pay benefits to fund members upon their reaching retirement age.

Insurance companies

Pursuant to the Act on Insurance Activity, insurance companies may conduct their business in the form of a joint-stock company or mutual insurance society. Moreover, insurance business in Poland may be conducted, on the basis of the reciprocity rule, by a foreign insurance company in the form of a main branch.

A bank may be established by three individuals or by a legal entity, whether Polish or foreign. A bank in the form of a joint-stock company may be established only upon gaining a permit from the BSC issued in conjunction with the Ministry of Finance. The minimum **share** capital for a bank is the PLN equivalent of Eur5.000.000

The BSC will grant its consent provided that:

* the founders and persons envisaged for appointment to the management board warrant that they will engage in prudent and stable management of the bank;

* the three-year banking activity plan prepared by the founders indicates that there would appear to be no risk to cash deposits held with the bank;
* a minimum of two prospective management board members have the education and professional experience necessary for managing a bank and, in the case of citizens of other countries, a confirmed command of the Polish language. The appointment of two members of the management board, including the president, is subject to the consent of the BSC.

The BSC will issue a permit for establishment of the bank within three months of receipt of a complete application.

The bank may start its operations upon receipt of another permit of the BSC, which may be issued if the bank fulfils the criteria for establishment.

The consents of the BSC will cease to have effect if the bank does not commence its activity within one year of receipt of the permit for establishment of the bank.

The Banking Law also enables foreign banks to conduct banking activity in the form of branches or representative offices. However, whereas a branch is entitled to perform banking operations, a representative office may only promote the activity of the parent bank. The establishment of a branch or representative office is subject to a permit of the BSC, which is issued in agreement with the Minister of Finance. The procedure for establishing a bank is applied accordingly to establishment of a representative office or branch of a foreign bank. The appointment of a director and deputy director of a branch is subject to the consent of the BSC issued subsequent to an application from the given foreign bank.

Investment funds

An investment fund may be established by an investment fund society, after obtaining a permit issued by the Securities and Exchange Commission. An investment fund society may be established only as a jointstock company with its registered seat in Poland, and also requires a permit from the Securities and Exchange Commission for establishing and managing investment funds. The minimum **share** capital of a society is PLN3 million ($750,000). If the society manages more than one investment fund, the amount of **share** capital shall be increased by PLN1 million for each subsequent fund.

The investment fund is required to enter into an agreement with the depository for keeping the register of the fund's assets as well as to

collect contributions to the fund in the amount set forth in the statue, but not less then PLN4 million ($1 million), and to enter the fund in the register of funds.

The Securities and Exchange Commission shall issue a decision on granting a permit within two months of submission of the application.

Pension funds

The establishment of a pension fund, is similar to the establishment of an investment fund. A pension fund may be established only by a general pension society or employee pension society. A general pension society may be established only as a joint-stock company with a minimum **share** capital of Eur4 million. The **share** capital may be paid up only by way of a cash contribution. A general society needs to draft a statute for the fund, conclude an agreement with the depositary, obtain a permit from the Commission for Insurance and Pension Fund Supervision and enter the fund into the register of funds. The Commission shall issue a decision on the permit within three months from the date of application. The Commission will reject an application if it does not fulfil the requirements set forth in the law, the fund statute does not ensure the safety of the interests of the pension fund members, or that the employees of the fund are not unfit to properly discharge their duties.

Insurance companies

The statute of an insurace company in the form of a joint-stock company is subject to the approval of the Ministry of Finance, as are any major changes thereto. Its **share** capital cannot be lower than the highest minimum guarantee capital required for the insurance classes in which the insurance undertaking conducts activity.

Finally, to commence insurace activity the company must obtain the permit for conducting insurance activity issued by the Ministry of Finance subsequent to an opinion given by the Commission for Insurance and Pension Fund Supervision.

FINANCIAL SERVICES: ONLINE AND E-BANKING

The growing popularity of the internet has affected the banking sector as well. The Banking Law Act contributed to the growth of e-banking by providing that declarations of intent submitted in connection with banking operations may be expressed by means of electronic carriers of information. The documents may be drawn up by such carriers providing that they are properly created, fixed, stored and secured. It is worth pointing out that the Banking Law does not contain any specific provisions regarding establishment and conduct of operations by internet banks. The latter are usually organized as companies affiliated with already existing banks and act merely as channels of distribution of new services for customers.

Another question often raised is how internet banks can fulfil their obligations arising out of money laundering laws such as the obligations to identify their customers and to report and/or refuse the execution of suspicious transactions. Apart from these regulatory issues, one also faces the question of the validity of agreements entered into over the internet. The Act on Electronic Signature, implementing the EU Electronic Signatures Directive 1999/43/EC, which will enter into force on August 16 2002, is meant to solve this problem. Pursuant to the Electronic Signature Act, a document signed by a safe electronic signature (which is a signature that meets certain additional criteria provided for in the law) shall have equal legal validity with manually signed documents.

Personal data protection is central to e-banking. E-- banking service contracts must meet the legal requirements set forth in the Personal Data

Protection Act. This Act provides for general rules on the lawfulness of the processing of personal data defined as virtually any operation on personal data, including assembling, recording, storage, treatment, modification, giving access, and removal of personal data, especially when it is performed by IT systems. According to the Act, the data administrator must (i) obtain the explicit prior consent of the person whose data is to be processed (ii) adopt technical and organizational measures to ensure the security of processed data.

ACQUISITION OF FINANCIAL INSTITUTIONS

Banks

Pursuant to the Banking Law, a person willing to directly or indirectly purchase or acquire a bank's **shares** is required to obtain the permission of the BSC for exercising voting rights from such **shares** if, as a result of the acquisition or purchase, this person's shareholder-meeting vote entitlement would exceed the next predetermined threshold. Thresholds stand at 10%, 20%, 25%, 33%, 50%, 66%, and 75% of votes at the shareholders meeting. Failure to obtain such permission results in the person being authorized to exercise no more than 5% of the votes or such amount as previously authorized.

Exercising votes in violation of law will result in shareholder meeting resolutions being null and void. The Banking Law provides that the BSC may refuse to grant consent to exercise voting rights from banks' **shares** if the influence of a person intending to acquire or purchase **shares** may prove adverse to the prudent and stable management of the bank when assets used for such acquisition are derived from loans, credits or undocumented sources or when the provisions of law in force where the buyer has its registered seat or place of residence prevent the BSC from exercising effective supervision. The bank must be notified if the block of **shares** held by any person gives it a right to exercise more than 5% of votes at the shareholders meeting. Moreover, the BSC must be notified if a person intends to transfer a block **shares** giving the right to exercise more than 10% of votes at the bank's shareholders meeting.

The above-mentioned requirements are also applicable to the purchase or acquisition of bonds convertible into bank **shares**, depository receipts or other securities giving rise to rights or duties to purchase **shares**.

Investment funds

Pursuant to the Law on Investment Funds the direct or indirect acquisition of or subscription for **shares** in an investment fund society (resulting in the take over of the investment fund), in an amount that results in attaining the threshold levels of 20%, 33% or 50% of the number of votes at the shareholders meeting of the society, is subject to the permission of the SEC. A permit is also required for acquisition of convertible bonds. The acquisition of or subscription for **shares** or bonds without a permit is void. Taking over the management of an investment fund also requires a permit from the SEC.

Pension funds

In light of the Law on Organisation and Operating of Pension Funds, the subscription for **shares** in a general society by existing shareholders requires a notification to the Commission for Insurance and Pension Fund Supervision. However, any acquisition of or subscription for **shares** in a general society by any other person or entity or a

subscription by an existing shareholder resulting in exceeding a shareholder meeting vote threshold of 20%, 25%, 33%, 50%, 66%, 75% or 80% or votes requires a prior permit from the Commission for Insurance and Pension Fund Supervision. Any such acquisition of or subscription for **shares** without such as permit is void.

Insurace companies

In the case of insurance companies a permit from the Ministry of Finance is required for purchases or acquisitions attaining the thresholds of 25%, 50% and 75% of votes at the general shareholders' meeting of the company. Exercising votes in violation of the law will result in shareholder meeting resolutions being null and void. The Ministry of Finance is also the permit-- issuing body for mergers between insurance companies. To obtain a permit, insurance companies are obliged to prove that after the merger they will have ai their disposal funds equal to the required solvency margin. It is also admissible to conclude a contract with another insurance company for the transfer of all or some of its insurance policies (portfolio transfer). Such a contract requires prior permission from the Commission for Insurance and Pension Fund Supervision. The Ministry of Finance also has to be notified of an acquisition of **shares** in an amount that results in obtaining more than 10% of votes at the shareholders meeting of the company.

COMPETITION REGULATIONS
Concentrations involving banks are subject to the general merger control rules set forth in the Law on Competition and Consumer, which requires notification of a concentration if the aggregate worldwide turnover of the corporate groups of the merger participants in the last fiscal year exceed C50 million. Apart from mergers as such, any forms of takeover of control, and the creation of joint ventures, the Competition Law also requires notification of acquisitions of 25% or more of votes at the target's general assembly and of cross-directorships. Concentrations involving certain specific types of financial institutions (in particular investment and pension funds) are governed by special rules.

The Competition Law provides for a number of exemptions from the merger control requirement that may be pertinent specifically to the activity of financial institutions. In particular, no notification is required if the concentration consists in a temporary acquisition of or subscription for **shares**lt; or interests by a financial institution with a view to reselling them, provided that the resale of **shares**lt; or interests takes place within one year from the day of acquisition, and that (a) the institution concerned does not exercise the rights in respect of those **shares**lt; or interests, except for the right to dividend, or (b) exercises such rights only with a view to preparing the resale of all or part of the enterprise, its assets or those **shares**lt; or interests. However, undertakings that have availed themselves of this exemption from the merger control requirement, have to notify the competition authority if they intend to commence exercising the rights attached to such **shares**lt; or interests subscribed for or acquired without prior notification.

Additionally, there are special rules for the calculation of the turnover of banks, insurance companies, investment funds, and brokerage houses for the purposes of establishing whether the quantitative merger control thresholds were met.

BANK SUPERVISION

Banking supervision seeks to continually ensure that bank account deposits are safe and that banks are conducting their activity in compliance with

relevant provisions of law. Prudential supervision seeks to safeguard the solvency and liquidity ratios as well as concentration limits of the banks. The BSC has powers to give banks recommendations and general directives on the conduct of banking activity, as well as means of collecting, reviewing and analyzing reports from the banks on a solo and consolidated basis.

The banks are obliged to have in place administration, book-keeping and internal control arrangements in accordance with applicable law.

DISCLOSURE REQUIREMENTS

As indicated above, the competent Polish authorities must be informed in a timely fashion of possible changes with respect to significant changes in shareholding structure (described above) as well as with respect to changes in the management of a bank. The BSC is obliged to refuse consent for appointment of board members with criminal convictions or punished for intentional offences or if fiscal criminal proceedings are being conducted against them. Moreover the BSC may refuse its consent for appointment of such individuals if they do not warrant that they will engage in stable and prudent management of the bank or do not have the necessary education and experience or if they have caused documented property losses in their previous places of work.

WHEN A BANK BECOMES INSOLVENT

As described above, the BSC has an extensive set of instruments for use where the solvency or liquidity of the bank gives cause for concern.

* If a bank incurs a balance sheet loss or there is threat of such a loss, the BSC may indicate a time limit for preparation of recovery programme proceedings;

* If the management board fails to submit a recovery programme or such programme proves ineffective, the BSC may decide to appoint a commissioner-administrator for the bank;
* If the bank's losses exceed half of the bank's own funds or the bank's assets do not suffice to satisfy its obligations, the BSC may decide to suspend the bank's activities and to have it taken over by another bank, to liquidate the bank, or to file a petition for declaration of bankruptcy with the relevant court.

The deposits held in bank accounts are covered by part of the mandatory bank deposit guarantee system. All banks are obliged to contribute mandatory payments to the Bank Guarantee Fund. The Fund guarantees account holders repayment of certain levels of monies if a bank is declared bankrupt. In the case of deposits not exceeding E1,000, the Fund is obliged to pay out 100% of such amounts and for amounts exceeding Eur 1,000 but less than Eur18,000 - 90%.

CAPITAL REQUIREMENTS AND BANK SECRECY

Liquidity and solvency

Pursuant to the Banking Law, a bank is obliged to main liquidity as required by the, type and volume of its activity under the regulatory supervision of the BSC.

Moreover, banks are obliged to maintain a minimum 8% solvency ratio, with this ratio rising to 15% for the first year of a start-up and 12% for the second year of a start-up.

Large exposures

The total sum of a bank's exposure resulting from receivables and off-balance sheet liabilities with respect to one entity or group of entities connected organizationally or in capital may not exceed (i) 20% of the bank's own funds if any such entity is a dependent or dominant entity to the bank or dependent on a dominant entity of a bank, or (ii) 25% of the bank's own funds in case of other entities.

BANK SECRECY

The Banking Law defines bank secrecy as:

* All information regarding banking operations and persons party to an agreement with a bank subsequent to negotiations, as well as connected with the conclusion of such an agreement and the implementation thereof with the exception of information without which the carrying out of the agreement would be impossible;

* Information regarding persons who are not a party to an agreement with a bank, but who performed operations connected with the conclusion of such contract.

The obligation to preserve bank secrecy relates not only to banks and their employees but also to entities that banks engage to facilitate conduct of their banking operations. Information falling within the scope of bank secrecy may be disclosed to a third party upon prior written consent of the party to an agreement with a bank and, further, such consent must specify exactly the scope of information to be disclosed and the beneficiary of such information. Banking Law provides for certain exceptions in disclosing information covered by bank secrecy, including disclosures to other banks, the BSC, courts, the Police, prosecutors in connection with pending criminal proceedings against account holders and institutions whose role it is to counteract money laundering.

WOJCIECH ZIELINSKI

Salans Law Firm, Warsaw

Wojciech Zielinski is a partner with the law firm of Salans. He is a member of the Financial Institutions Practice Group of the firm and is based in Warsaw. Before joining Salans, Wojciech Zielinski practised as a lawyer in the Office of the Council of Ministers. Mr Zielinski was involved in drafting the early Polish legislation concerning banking, foreign exchange law, and taxes. From 1993 through 1996 he was general counsel to the Polish Investment Bank. At that time, he was responsible for all legal services of the Bank including such issues as lending and tak
ing of security (including real estate), venture capital, mergers and acquisitions, and capital markets. Since June 1996 he has been with the Warsaw office of Salans.

Mr Zielinski has wide experience in a number of areas including banking, privatization, project finance, corporate finance, general lending and taking of security, taxation of foreign multilateral and bilateral institutions, investment funds and major companies investing in Poland.

Mr Zielinski graduated with a master's degree from the Faculty of Law and Administration at Warsaw University in 1986 and was admitted as a legal adviser in Poland in 1991. He speaks Polish and English.

AGNIESZKA ROSTEK-WAWRZYNIAK

Salans Law Firm, Warsaw

Agnieszka Rostek-Wawrzyniak is a senior associate with the law firm of

Salans. She is admitted to practice in Poland as a legal adviser. She is a member of the Financial Institutions Practice Group of the firm and is presently based in Warsaw. Before joining the Warsaw office of Salans, she worked for an American law firm based in Warsaw, where she was responsible for developing the banking practice.
Ms Rostek-Wawrzyniak specializes in corporate finance and banking law. She has broad experience in the area of international syndicated loans, commercial banking, and foreign exchange instruments, as well as in the financing of investment ventures, the issuance of bank securities and the selection of security arrangements for various transactions. Agnieszka Rostek-Wawrzyniak worked as an in-house lawyer for a financial institution and she was in charge of legal issues relating to the establishment and organization of a bank, drafting bank regulations, lending procedures, loan documentation, as well as advising on all aspects of banking operations. Her practice also includes factoring and insurance.

Ms Rostek-Wawrzyniak graduated with a Master's Degree from the Faculty of Law and Administration at Warsaw University, majoring in financial law. She obtained the Certificate of Studies of Oxford and Cambridge Universities on completion of a one-year course on Common Law and the EU law, run by the British Centre for English and European Union Legal Studies at Warsaw University. In 1993, she obtained an MA in Economics at the Warsaw School of Economics, where she graduated from the Foreign Trade Department, specializing in banking and international marketing.

THIS IS THE FULL-TEXT.

Geographic Names: Poland

Descriptors: Banking industry; Consolidation; Bank acquisitions & mergers; Industrywide conditions; Regulation of financial institutions
Classification Codes: 9176 (CN=Eastern Europe); 4310 (CN=Regulation); 8100 (CN=Financial services industry); 2330 (CN=Acquisitions & mergers)
Print Media ID: 14903

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401(k) PLANS: Suit shows conundrum of company stock issue.(Brief Article)
Anand, Vineeta
Pensions & Investments , v 30 , p 1
June 10 , 2002
ISSN: ISSN: 1050-4974
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Document Type: Magazine/Journal ; Trade
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Text:

WINSTON-SALEM, N.C. - When it comes to company stock in 401(k) plans, employers apparently are damned if they let participants sell their holdings, and damned if they don't.

First, the collapse of Enron Corp. highlighted the liabilities plan sponsors face for not letting participants sell their stock when the **share** price drops. Now, a recent class-action lawsuit pinpoints the risks employers face for failing to let workers hold on to depressed stock that later rebounds.

The lawsuit, Tatum vs. The R.J.R. Pension Investment Committee of the R.J. Reynolds Tobacco Co. Investment Plan, was filed by 401(k) participant Richard G. Tatum on May 23 in U.S. District Court in North Carolina. It alleges breach of fiduciary duty by R.J. Reynolds, Winston-Salem, for liquidating participants' holdings in stock in the Nabisco foods affiliate on Jan. 31, 2000, six months after the company split its tobacco and food operations in half.

Frozen holdings

Before the company's breakup in June 1999, participants could invest in stock of both Nabisco, the food manufacturer, as well as its parent corporation, Nabisco Group Holdings. The plan was amended on June 14, 1999, and participants' holdings in Nabisco and its parent company were frozen. Participants were told the Nabisco stock funds would be eliminated in about six months. According to the lawsuit, nothing in the amendment prevented the plan fiduciaries from continuing to hold the frozen Nabisco stock accounts.

Plaintiffs contend R.J. Reynolds Tobacco officials failed to act solely in the best interests of participants by ``eliminating the Nabisco stock as investment alternatives under the plan, requiring complete divestment of all plan assets from all Nabisco stock ... and failing to exercise their **discretion** to include these funds as continuing **investment** options under the plan.''

The plan fiduciaries ``failed to consider the outlook for Nabisco stocks in January 2000; they simply barreled ahead and sold all Nabisco stock held by the plan based on a decision made months earlier,'' said Bill Lann Lee, partner in the Washington office of Leiff, Cabraser Heimann & Bernstein LLP, which represents the plaintiffs.

Tens of millions

Jeffrey Lewis, a lawyer at the Oakland, Calif.-based firm of Sigman, Lewis & Feinberg, which also represents the plaintiffs, said the losses suffered by the participants could run into the tens of millions of dollars. On Dec. 30, 1999, a month before the cigarette maker's sale of the Nabisco stock, the $1.2 billion retirement plan's Nabisco holdings were valued at $15.6 million, or 1.3% of total assets.

R.J. Reynolds Tobacco and its parent company, R.J. Reynolds Tobacco Holdings Inc., ``believe this lawsuit is without merit and intend to defend it vigorously,'' according to a company statement. A company spokesman would not comment further.

The crux of the suit rests on an employer's dilemma: risking that the depressed stock of a former affiliate might slide further, causing even bigger losses to participants, or acknowledging the potential for participants to win big if the stock takes off.

The case hinges on ``classic 20-20 hindsight,'' observed Sherwin S. Kaplan, of counsel to the Washington law firm of Thelen Reid & Priest LLP. Mr. Kaplan has no role in the suit. ``A publicly traded stock, absent fraud, is worth what it is worth. Nobody knows what it is going to be valued at,'' said Mr. Kaplan, a former deputy associate solicitor in the Labor Department's plan benefits security division.

While the plaintiffs' lawyers in the R.J.R. case charge there is sufficient evidence to show that R.J. Reynolds officials anticipated Nabisco's stock price would rise dramatically after the breakup, attorneys generally representing employers say nothing in federal pension law

requires plan sponsors to let participants bet on a single stock.

``Plan sponsors should administer the plans in a way to allow participants to save for their retirement, not allow participants to take a flyer on a single stock,'' said William A. Schmidt, partner in the Washington law firm of Kirkpatrick & Lockhart LLP. He is not connected to the suit.

Moreover, unless plan documents specify that R.J. Reynolds' plan had to hold Nabisco stock, the fiduciaries were under no obligation to let participants hold it, said C. Frederick Reish, partner in the Los Angeles firm of Reish, Luftman, McDaniel & Reicher PC and a well-known ERISA attorney.

Mr. Reish noted, however, that if R.J. Reynolds officials based their decision to sell participants' holdings of Nabisco stock from the plan after the company's breakup simply for corporate reasons without considering whether participants might benefit from continuing to hold it, ``then the plan committee is in trouble.''

Under scrutiny

Should the case go to trial, the process that R.J. Reynolds officials used to decide to sell the Nabisco stock would be under scrutiny, Mr. Reish and others noted.

The safest course for employers divesting businesses as part of a restructuring or acquiring a unit of another company is to freeze participants' investments in the spun-off or acquired business, but not necessarily force participants to sell their current holdings, said Rob Reiskytl, a consultant in the Minneapolis office of Hewitt Associates.

He said employers should give participants several months' notice about their plans and explain their reasoning for their actions.

R.J. Reynolds gave six months notice.

Seth Moskowitz, an R.J. Reynolds spokesman, noted the company did not advise workers to buy Nabisco stock, nor were workers required to own any company **shares**. Moreover, the company match - up to the first 6% of participants' contributions - is not made in company stock; instead, it tracks the employee's own investment choices in the same proportion.

Mr. Lewis also represents plaintiffs in a similar lawsuit against SBC Communications Inc., San Antonio, Texas, and anticipates that case will be settled outside court. In that case, participants filed a $1.15 billion class-action lawsuit charging that SBC sold off more than $600 million of employee holdings in AirTouch Communications Inc., whose stock had more than doubled before SBC took it over, and reinvested the **proceeds** in SBC stock, which remained flat. AirTouch is now known as Vodafone AirTouch.

Stronger claim

He said plaintiffs in the R.J. Reynolds case have a stronger claim because the amendment to the plan allowed fiduciaries to simply freeze participants' investments in the Nabisco stock without forcibly selling it The SBC plan amendment, by contrast, mandated the elimination of the AirTouch stock fund by a specified date.

Plan amendments are directives to administrators; as such, employers making changes in accordance with amendments are not subject to fiduciary duties. Because the R.J. Reynolds administrators went beyond the plan document and took it upon themselves to eliminate the Nabisco stock investments, their decision was subject to fiduciary duties inherent in federal pension law to act solely in the best interests of the participants, explained Teresa Renaker, an associate working with Mr. Lewis at Sigman, Lewis & Feinberg.

The suit against R.J. Reynolds contends that when the company separated its tobacco and food businesses on June 15, 1999, Nabisco Group Holdings (the parent corporation of the food business) **shares** traded at around $21 a **share**; and Nabisco Holdings Corp. **shares** around $42 a **share**.

On Jan. 31, 2000, when R.J. Reynolds Tobacco sold all participant

holdings of the two stocks from its retirement plan, Nabisco Group Holdings traded around $8.50 a **share** and Nabisco Holdings at $30 a **share**, according to the lawsuit. By the end of June 2000, Nabisco Group Holdings stock had risen to $30 a **share** and Nabisco Holdings, to $55 a **share**. Philip Morris Cos. acquired Nabisco Holdings in December 2000 at $55 a **share**, the lawsuit notes. At the same time, R.J. Reynolds Tobacco reacquired all outstanding **shares** of Nabisco Group Holdings for $30 a **share**.

Publisher Name: Crain Communications, Inc.
Company Names: *Nabisco Holdings Corp._Finance; R J Reynolds Tobacco Co._Cases
Descriptors: *Pension funds--Finance; Baked products industry--Finance; Tobacco industry --Cases
Event Names: *830 (Sales, profits & dividends); 980 (Legal issues & crime)
Geographic Names: *1USA (United States); 1U0PR (Puerto Rico)
Product Names: *6370000 (Pension Funds & Benefit Plans); 2052000 (Cookies & Crackers); 2100000 (Tobacco Products)
Industry Names: BANK (Banking, Finance and Accounting); BUSN (Any type of business)
SIC Codes: 6371 (Pension, health, and welfare funds); 2052 (Cookies and crackers); 2100 (TOBACCO PRODUCTS)
NAICS Codes: 52511 (Pension Funds); 311821 (Cookie and Cracker Manufacturing); 3122 (Tobacco Manufacturing)

66/9/13 (Item 13 from file: 9)
02766258 Supplier Number: 25269964
401(k) PLANS: Suit shows conundrum of company stock issue

Pensions & Investments , v 30 , p 1
June 10, 2002
Document Type: Journal ISSN: 1050-4974 (United States)
Language: English Record Type: Fulltext
Word Count: 1248

TEXT:

By: Vineeta Anand

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Product Names: Pension, health, and welfare funds (637000)
Concept Terms: All market information; Trends
Geographic Names: North America (NOAX); United States (USA)

66/9/14 (Item 14 from file: 16)
09872795 Supplier Number: 86766818

PPR - $.0365 May Dividend.

Business Wire , p 0553
June 5 , 2002
Language: English Record Type: Fulltext
Document Type: Newswire ; Trade
Word Count: 467

Text:

Business Editors

PHOENIX--(BUSINESS WIRE)--June 5, 2002

ING Prime Rate Trust (NYSE: PPR), a diversified closed-end management investment company listed on the New York Stock Exchange, declared 3.65 cents per **share** monthly dividend on May 31, 2002 for the 31 days of May, payable on June 24, 2002 to shareholders of record on June 10, 2002. This represents the 169th consecutive monthly dividend since the Trust's inception in May 1988.

The following are annualized distribution rate calculations based on

the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
May 31, 2002	$ .0365	5.93%	6.42%
April 30, 2002	$ .0365	6.08%	6.57%
March 28, 2002	$ .0385	6.24%	6.57%
February 28, 2002	$ .0385	6.97%	7.41%
January 31, 2002	$ .041	6.61%	7.08%
December 21, 2001	$ .042	6.82%	7.45%
November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%
September 30, 2001	$ .047	7.61%	8.25%
August 31, 2001	$ .052	7.96%	8.11%
July 31, 2001	$ .054	8.19%	8.43%
June 30, 2001	$ .054	8.42%	8.57%

ING Prime Rate Trust was the first fund to invest in a portfolio of floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of capital.

The Trust is managed by ING Investments, LLC, and distributed by ING Funds distributor, Inc. The Trust and distributor are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE: ING), one of the world's leading financial services companies with operations in over 65 countries. The Trust's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact ING Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at Stacey.parker@ingfunds.com.

Publisher Name: Business Wire
Company Names: *ING Group N.V.; ING Prime Rate Trust
Geographic Names: *4EUGE (Germany)
Industry Names: BUS (Business, General); BUSN (Any type of business)

66/9/15 (Item 15 from file: 610)
00714324 20020515135B1114
Phoenix Reports First Quarter 2002 Results

Business Wire
Wednesday , May 15, 2002 07:09 EDT
Journal Code: BW Language: ENGLISH Record Type: FULLTEXT Document Type: NEWSWIRE
Word Count: 3,326

Text:

HARTFORD, Conn., May 15, 2002 (BUSINESS WIRE)
- -- Strong sales resulting
from expanded wholesaling and distribution network -- Net income impacted
by
adoption of new accounting standard

Note: First quarter 2002 results are compared with the fourth quarter of
2001
rather than the first quarter of 2001 because of Phoenix's June 2001
demutualization and its January 2001 purchase of the 40 percent of Phoenix
Investment Partners (PXP) it did not already own. These transactions make
certain quarterly year-over-year comparisons less meaningful.

The company considers operating income and cash operating income excluding
venture capital in evaluating its financial performance in addition to net
income presented in accordance with Generally Accepted Accounting
Principles
(GAAP). (See attached table reconciling these measures.) Operating income
represents net income adjusted for realized investment **gains** and
losses and
nonrecurring items. Nonrecurring items include expenses related to
Phoenix's
demutualization and its acquisition of the PXP minority interest, an early
retirement program, an adjustment to the amortization of deferred
acquisition
costs, and the cumulative effect of accounting changes. For cash operating
income, the company adds back amortization of intangible assets to
operating
income to measure the ability of the business to generate cash earnings.
The
company excludes the Venture Capital segment, a separate reporting segment,
to
measure the performance of its core operating businesses in order to
provide
greater transparency when evaluating operating performance.

Against the backdrop of strong sales and challenging markets, The Phoenix
Companies, Inc. (NYSE: PNX) today reported first quarter 2002 cash
operating
income, excluding venture capital, of $25.7 million, or $0.25 per
share,
compared with $28.2 million, or $0.27 per **share**, in the fourth
quarter of
2001. In the first quarter of 2002, operating income was $12.8 million, or
$0.13 per **share**, compared with $22.7 million, or $0.22 per
share, in the

fourth quarter of 2001. The company reported a GAAP net loss of $101.4 million, or a $1.00 loss per **share**, in the first quarter of 2002, which includes a $130.3 million charge recorded as a cumulative effect of an accounting change related to the adoption of a new accounting standard for goodwill and other intangible assets, partially offset by a nonrecurring after-tax adjustment to the amortization of deferred acquisition costs related to the closed block of $15.1 million. This compares with a $7.5 million net loss, or a $0.07 loss per **share**, in the fourth quarter of 2001.

Chairman and Chief Executive Officer Robert W. Fiondella said, "Our focus is to continually grow the business, and we remain committed to achieving our previously stated goal of 8 to 10 percent cash return on equity, excluding venture capital, by the end of 2003. In this quarter, we maintained strong sales momentum in each business area - life, annuity and investment management - a clear indication that our focus and investments in our wholesaling network and product are yielding positive results. We are encouraged by the initial results relating to our acquisition of Kayne Anderson Rudnick Investment Management."
Mr. Fiondella continued, "We do remain cautious about the rest of the year should the difficult equity market and credit environment persist."

Mr. Fiondella also cited the following highlights of the quarter that impacted sales:

-- The company's distribution relationship with State Farm continued to grow, with approximately one-third of the 9,650 eligible State Farm agents now certified to sell Phoenix products. Sales of life insurance continued to increase and fixed annuities had a strong start. -- The company's life insurance products moved up in ranking at many of its targeted distribution firms. The products are now in the top five at four firms, in addition to WS Griffith. -- With the acquisition of Kayne Anderson Rudnick Investment Management, LLC, Phoenix now participates in all major sponsored managed accounts programs.

Other developments of note include:

-- Purchase of 6.3 million **shares** as of March 31, 2002, and an additional 800,000 **shares** as of May 14, 2002, through the company's stock repurchase program; -- Announcement of an agreement in principle to form a strategic alliance with LJH Global Investments, LLC, a hedge fund advisory firm; -- Conversion of the company's Connecticut-based trust company to an OCC-chartered national trust company, Phoenix National Trust Company; and -- Continued analysis of financial strategies in connection with the closed block and of alternative approaches to venture capital investments.

Segment Results

Phoenix has two operating segments, Life and Annuity and Investment Management, and two reporting segments, Venture Capital and Corporate and Other. The Corporate and Other segment includes unallocated capital and

expenses, as well as certain businesses not of sufficient scale to report independently. The company looks at its segment results on the basis of operating income (loss) before amortization and income taxes to focus on the earnings ability of each segment.

	First Quarter 2002	Fourth Quarter 2001
	(in millions)	
Life and Annuity	$ 28.3	$ 24.7
Investment Management	11.4	14.1
Venture Capital	(5.0)	15.6
Corporate and Other	(8.8)	(1.0)

Life and Annuity - Operating income before amortization and income taxes in the first quarter of 2002 was $28.3 million, compared with $24.7 million in the fourth quarter of 2001. The increase can be attributed to continued strong sales, favorable mortality and persistency, and more favorable performance in the closed block than originally anticipated in the funding.

The market environment continued to favor sales of fixed rate life insurance and annuity products, demand satisfied by the company's balanced product portfolio.

Total life insurance sales (annualized premium and single premium) were $56.5 million in the first quarter of 2002, compared with $58.3 million in the fourth quarter of 2001, a strong result given the typical, seasonal spike in fourth quarter sales each year. Annualized premium was $37.6 million in the first quarter of 2002, about even with the $37.0 million in the fourth quarter of 2001. Survivorship life insurance sales continued to account for one third of total sales, a similar proportion as in the last year's fourth quarter, and a strong rebound from the first half of 2001, when survivorship products accounted for 12 percent of sales.

Year over year, total life sales in the first quarter of 2002 of $56.5 million were lower than the total sales of $65.8 million in the first quarter of 2001. However, last year's first quarter contained significant single premium private placement insurance sales, which, by nature, tend to be less predictable. The $37.6 million in annualized premium in the first quarter of 2002 represents a 68 percent increase over the $22.3 million in annualized premium in the first quarter of 2001, and includes a fivefold increase in universal life annualized premium.

Annuity deposits in the first quarter of 2002 were $575.4 million, compared with $593.4 million in the fourth quarter of 2001, a slight decline from extraordinarily high fourth quarter sales of variable annuities. This quarter's deposits were more than double the $286.6 million in deposits recorded in the first quarter of 2001, reflecting a sharp rise in both variable and fixed annuities, as well as private placement annuities.

Investment Management - Operating income before amortization and income

taxes
was $11.4 million for the first quarter of 2002, compared with $14.1 million
in the fourth quarter of 2001. The decline is largely attributable to the effect of lower fourth quarter incentive compensation expense. This quarter the company resumed accruing for compensation in anticipation of a more normal
expense level. The decline is further attributable to lower earnings from Aberdeen Asset Management, in which the company has an equity ownership interest.

Assets under management, net sales and operating income were all positively impacted by the company's acquisition of a majority stake in Kayne Anderson Rudnick Investment Management, which closed on January 29, 2002.

Assets under management for the segment on March 31, 2002 were $60.7 billion,
compared to $52.1 billion on December 31, 2001, including $9.0 billion of Kayne Anderson Rudnick Investment Management assets.
Net sales were $399.5 million in the first quarter of 2002, compared with net
redemptions of $593.5 million in the fourth quarter of 2001 and net sales of
$351.3 million in the first quarter of 2001.

Deposits totaled $2.3 billion in the first quarter of 2002, including $708.7
million in sales from Kayne Anderson Rudnick Investment Management, compared
with $1.8 billion in the fourth quarter of 2001. Deposits declined from the $2.5 billion recorded in the first quarter of 2001 largely due to lower sales
in mutual funds and institutional accounts. Redemptions decreased for the second consecutive quarter to $1.9 billion in the first quarter of 2002, compared with $2.4 billion in the fourth quarter of 2001. Year over year, redemptions also decreased from the $2.2 billion recorded in the first quarter
of 2001.

Venture Capital - In the first quarter of 2002, venture capital partnerships
had a $5.0 million operating loss before amortization and income taxes, compared with operating income of $15.6 million in the fourth quarter of 2001.
The decline reflects the impact of the weak equity markets in the first quarter on the company's estimates of partnership holdings. Total distributions by partnerships in the first quarter of 2002 were $9.4 million,
compared with $17.3 million in the fourth quarter of 2001. Capital contributions to partnerships were $13.0 million in the first quarter of 2002,
compared with $11.7 million in the fourth quarter of 2001. On March 31, 2002,
venture capital assets were $290.3 million, representing 2 percent of the $14.5 billion of invested assets and cash in the general account portfolio.

Corporate and Other - In the first quarter of 2002, the Corporate and Other segment had an $8.8 million operating loss before amortization and income taxes, compared with an operating loss of $1.0 million in the fourth quarter
of 2001, due primarily to lower investment income.

The Phoenix Companies, Inc. (NYSE: PNX) is a leading provider of wealth management products and services to individuals and institutions. Through a variety of advisors and financial services firms, Phoenix helps the affluent and high net worth accumulate, preserve and transfer their wealth with an innovative portfolio of life insurance, annuity and investment management products and services. With a history dating to 1851, The Phoenix Companies, Inc. has two principal operating subsidiaries, Phoenix Life Insurance Company and Phoenix Investment Partners, Ltd., and offers trust services through another subsidiary, Phoenix National Trust Company. Phoenix has corporate offices in Hartford, Conn. For more information on Phoenix, visit www.phoenixwm.com.

Note: The Phoenix Companies, Inc. will host a conference call today at 10:00 a.m. Eastern time to discuss with the investment community Phoenix's first quarter financial results. The conference call will be broadcast live over the Internet at www.phoenixwm.com in the Investor Relations section. To listen to the live call, please go to the Web site at least fifteen minutes prior to register, download and install any necessary audio software. The call can also be accessed by telephone at 1-973-321-1020. A replay of the call will be available by telephone at 1-973-341-3080 (passcode 3213178) and on Phoenix's Web site, www.phoenixwm.com in the Investor Relations section through May 22, 2002.

This release contains statements which constitute forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. These include statements relating to trends in, or representing management's beliefs about, the company's future strategies, operations and financial results, as well as other statements including words such as "anticipate", "believe," "plan," "estimate," "expect," "intend," "may," "should" and other similar expressions. Forward-looking statements are made based upon management's current expectations and beliefs concerning trends and future developments and their potential effects on the company. They are not guarantees of future performance. Actual results may differ materially from those suggested by forward-looking statements, as a result of risks and uncertainties which include, among others: (i) changes in general economic conditions, including changes in interest rates and the performance of financial markets; (ii) heightened competition, including with respect to pricing, entry of new competitors and the development of new products and services by new and existing competitors; (iii) the company's primary reliance, as a holding company, on dividends from its subsidiaries to meet debt payment obligations and the applicable regulatory restrictions on the ability of the subsidiaries to pay such dividends; (iv) regulatory, accounting or tax changes that may affect the cost of, or demand for, the products or services of the company's subsidiaries; (v) downgrades in the claims paying company's subsidiaries; (vi) discrepancies between actual claims experience and assumptions used in setting prices for the products of the company's insurance subsidiaries and establishing the liabilities of such subsidiaries for future policy

benefits
and claims relating to such products; (vii) movements in the equity markets that affect our investment results including those from venture capital, the
fees we earn from assets under management and the demand for our variable products; (viii) the company's success in achieving its planned expense reductions; and (ix) other risks and uncertainties described from time to time
in the company's filings with the Securities and Exchange Commission. The company specifically disclaims any obligation to update or revise any forward-looking statement, whether as a result of new information, future developments or otherwise.

Financial Highlights (Unaudited)

Income Statement Summary ($ in millions)	First Quarter 2002	Fourth Quarter 2001	First Quarter 2001
Revenues	$ 593.9	$ 628.2	$ 564.1
Operating Income (Loss) (1)	12.8	22.7	(88.6)
Add: Amortization of Goodwill and Intangibles	9.6	15.6	13.2
Cash Operating Income (Loss)	22.4	38.3	(75.4)
Cash Operating Income, excluding Venture Capital	25.7	28.2	10.6
GAAP Reported: Net Loss	(101.4)	(7.5)	(157.5)

Earnings Per **Share** (2)	First Quarter 2002	Fourth Quarter 2001	First Quarter 2001
Operating EPS	$ 0.13	$ 0.22	$ (0.85)
Cash Operating EPS	$ 0.22	$ 0.37	$ (0.72)
Cash Operating EPS, excluding Venture Capital	$ 0.25	$ 0.27	$ 0.10
Net Loss Per **Share**	$ (1.00)	$ (0.07)	$ (1.51)

Balance Sheet Summary ($ in billions)	First Quarter 2002	Fourth Quarter 2001	First Quarter 2001
Invested Assets	$ 14.5	$ 14.4	$ 12.4
Separate Account and Investment Trust Assets	5.7	5.6	4.8
Total Assets	22.9	22.5	19.7
Total Equity	2.2	2.4	1.7
Book Value Per **Share** (3)	$ 22.17	$ 23.51	$ 15.91
Assets Under Management	69.8	61.2	51.2

(1) Operating income represents net income adjusted for realized **gains**
and some non-recurring items because they are not indicative of the ongoing operations of the business segments. The size and

timing of realized **investment gains** are often subject to management's **discretion**. Certain non-recurring items are removed from net income if, in management's opinion, they are not indicative of overall operating trends. While some of these items may be significant components of our net income, we believe operating income is an appropriate measure that represents the net income attributable to the ongoing operations of the business. However, operating income is not a substitute for net income determined in accordance with generally accepted accounting principles, and may be different from similarly titled measures of other companies.

(2) Weighted average **shares** outstanding for fourth quarter 2001 is 103.3 million. Weighted average **shares** outstanding for first quarter 2001 is 104.6 million pro forma. Weighted average **shares** outstanding for first quarter 2002 is 101.2 million.

(3) Book value per **share** is based on 101.9 million and 100.1 million **shares** outstanding as of December 31, 2001 and March 31, 2002, respectively. Book value per **share** is pro forma based on 105.0 million **shares** outstanding as of March 31, 2001. Book value per **share** assumes net **proceeds** of $807.9 million, payout of cash and policycredits to policyholders of $41.4 million and estimated remaining expenses of $9.0 million for the three months ended March 31, 2001. Phoenix Reports First Quarter 2002 Results

Consolidated Balance Sheet
As of March 31, 2002 and December 31, 2001
(in millions, except per **share** data)

	2002	2001
ASSETS:		
Available-for-sale debt securities, at fair value	$ 10,014.0	$ 9,607.7
Equity securities, at fair value	303.7	290.9
Mortgage loans, at unpaid principal balances	522.7	535.8
Real estate, at lower of cost or fair value	75.3	83.1
Venture capital partnerships, at equity in net assets	290.3	291.7
Affiliate equity and debt securities	295.1	330.6
Policy loans, at unpaid principal balances	2,162.8	2,172.2
Other investments	278.0	282.4
Total investments	13,941.9	13,594.4
Cash and cash equivalents	564.4	815.5
Accrued investment income	217.0	203.1
Premiums, accounts and notes receivable	187.8	147.8
Reinsurance recoverable balances	55.9	21.3
Deferred policy acquisition costs	1,191.8	1,123.7
Premises and equipment	117.3	117.7
Deferred income taxes	--	1.8
Goodwill and other intangible assets	832.8	858.6
Net assets of discontinued operations	20.7	20.8

Other general account assets	25.7	50.7
Separate account and investment trust assets	5,711.2	5,570.0
Total assets	$ 22,866.5	$ 22,525.4
LIABILITIES:		
Policy liabilities and accruals	$ 13,395.6	$ 13,005.0
Policyholder deposit funds	340.5	356.6
Deferred income taxes	2.7	--
Indebtedness	599.9	599.3
Other general account liabilities	596.8	595.1
Separate account and investment trust liabilities	5,708.0	5,564.9
Total liabilities	20,643.5	20,120.9
MINORITY INTEREST:		
Minority interest in net assets of subsidiaries	4.1	8.8
STOCKHOLDERS' EQUITY:		
Common stock, $0.01 par value, 1.0 billion **shares** authorized; 106.4 million **shares** issued	1.0	1.0
Treasury stock, at cost: 6.3 million and 4.5 million **shares**	(99.0)	(66.0)
Additional paid-in capital	2,410.4	2,410.4
Accumulated deficit	(132.3)	(30.8)
Accumulated other comprehensive income	38.8	81.1
Total stockholders' equity	2,218.9	2,395.7
Total liabilities, minority interest and stockholders' equity	$ 22,866.5	$ 22,525.4

Certain reclassifications have been made to the 2001 financial statements to conform with the March 31, 2002 presentation.

Consolidated Statement of Income (in millions)

	First Quarter 2002	Fourth Quarter 2001	First Quarter 2001
REVENUES:			
Premiums	$ 257.4	$ 276.7	$ 266.0
Insurance and investment product fees	140.3	132.1	145.5
Net investment income	231.2	254.6	168.2
Net realized investment losses	(35.0)	(35.2)	(15.6)
Total revenues	593.9	628.2	564.1
BENEFITS AND EXPENSES:			
Policy benefits and increase in policy liabilities	333.9	350.0	334.1
Policyholder dividends	74.2	98.4	106.3
Policy acquisition cost amortization	(10.9)	37.7	35.1
Intangible asset amortization	8.1	12.1	13.2
Interest expense	7.7	6.1	7.1
Demutualization expenses	.9	1.1	10.7
Other operating expenses	136.0	131.8	237.4
Total benefits and expenses	549.9	637.2	743.9

Income (loss) before income taxes and minority interest	44.0	(9.0)	(179.8)
Applicable income tax (benefit) expense	12.3	(3.6)	(69.0)
Income (loss) before minority interest	31.7	(5.4)	(110.8)
Minority interest in net income of subsidiaries	(2.8)	(2.1)	(1.8)
Income (loss) before cumulative effect of accounting changes	28.9	(7.5)	(112.6)
Cumulative effect of accounting changes:			
Goodwill impairment	(130.3)	--	--
Venture capital partnerships and derivative financial instruments	--	--	(44.9)
Net loss	$(101.4)	$ (7.5)	$(157.5)

Certain reclassifications have been made to the 2001 financial statements to conform with the March 31, 2002 presentation.

Reconciliation of Income Measures (in millions)

	First Quarter 2002	Fourth Quarter 2001	First Quarter 2001
GAAP Reported: Net Loss	$(101.4)	$ (7.5)	$(157.5)
Less: Net Realized Investment **Gains** (Losses), after tax	1.6(A)	(22.1)	(10.2)
Less: Non-Recurring Items, after tax:			
Deferred Policy Acquisition Costs Adjustment	15.1	--	--
Expenses of Purchase of PXP Minority Interest	--	(2.9)	(43.8)
Early Retirement Pension Adjustment	--	(4.2)	(6.9)
Demutualization Expense	(.6)	(1.0)	(11.9)
Non-Recurring Items	14.5	(8.1)	(62.6)
Less: Cumulative Effect of Accounting Changes	(130.3)	--	3.9(B)
Operating Income (Loss)	12.8	22.7	(88.6)(C)
Less: Venture Capital, after tax	(3.3)	10.1	(86.0)
Add: Goodwill and Intangibles Amortization	9.6	15.6	13.2
Cash Operating Income, Excluding Venture Capital	$ 25.7	$ 28.2	$ 10.6

(A) Net realized investment **gains** and losses are presented net of the related impact on the policyholder dividend obligation and deferred acquisition cost amortization for the three months ended March 31, 2002.

(B) Excludes the cumulative effect of accounting change for venture capital partnerships. See (C) below.

(C) Includes the cumulative effect of accounting change for venture capital partnerships of $75 million (pre tax) as management considers this when evaluating the financial performance of the venture capital reporting segment.

Note: For additional information see our financial supplement.

The Phoenix Companies

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KEYWORD:          CONNECTICUT
SUBJECT CODE:     BANKING
                  INSURANCE
                  EARNINGS
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Company Names: phoenix investment partners, ltd.; phoenix companies, inc. (the); STRONG; PHOENIX INVESTMENT PARTNERS LTD; PXP CORP; PXP INC; VENTURE CAPITAL; CONVERSION INDUSTRIES INC; INVESTMENT MANAGEMENT INC; INVESTMENT MANAGEMENT GROUP; ABERDEEN ASSET MANAGEMENT PLC; PHOENIX LIFE INSURANCE CO INC; PHOENIX HOME LIFE MUTUAL INSURANCE CO I
Geographic Names: AMERICAS; CONNECTICUT; NEW ENGLAND; NORTH AMERICA; USA
Product Names: BANKING; COMPANY PROFILES; CORPORATE; CORPORATE FINANCIAL DATA; CORPORATE PERFORMANCE; FINANCIAL AND COMMODITY MARKETS; FINANCIAL SERVICES; INSURANCE ; INVESTMENT; LIFE INSURANCE; MERCHANT BANKS; MERGERS AND ACQUISITIONS; STOCKS AND SHARES
Event Names: CORPORATE FINANCIAL DATA; CORPORATE FUNDING; CORPORATE GROUPS AND OWNERSHIP ; CORPORATE PERFORMANCE; FINANCIAL AND COMMODITY MARKETS; INVESTMENT; JOINT VENTURES; MERGERS AND ACQUISITIONS; NEW PRODUCT DEVELOPMENT; PRODUCTIVITY; STOCKS AND SHARES; STRATEGY AND PLANNING

66/9/16 (Item 16 from file: 16)
09754515 Supplier Number: 85411195

PPR - $.0365 April Dividend.
Business Wire , p 0335
May 2 , 2002
Language: English Record Type: Fulltext
Document Type: Newswire ; Trade
Word Count: 469

Text:

Business Editors

PHOENIX--(BUSINESS WIRE)--May 2, 2002

ING Prime Rate Trust (NYSE: PPR), a diversified closed-end management investment company listed on the New York Stock Exchange, declared 3.65 cents per **share** monthly dividend on April 30, 2002 for the 30 days of April, payable on May 22, 2002 to shareholders of record on May 10, 2002. This represents the 168th consecutive monthly dividend since the Trust's inception in May 1988.

The following are annualized distribution rate calculations based on the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
April 30, 2002	$ .0365	6.08%	6.57%
March 28, 2002	$ .0385	6.24%	6.57%
February 28, 2002	$ .0385	6.97%	7.41%
January 31, 2002	$ .041	6.61%	7.08%
December 21, 2001	$ .042	6.82%	7.45%
November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%
September 30, 2001	$ .047	7.61%	8.25%
August 31, 2001	$ .052	7.96%	8.11%
July 31, 2001	$ .054	8.19%	8.43%
June 30, 2001	$ .054	8.42%	8.57%
May 31, 2001	$ .058	8.71%	8.85%

ING Prime Rate Trust was the first fund to invest in a portfolio of floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of capital.

The Trust is managed by ING Investments, LLC, and distributed by ING Funds distributor, Inc. The Trust and distributor are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE: ING), one of the world's leading financial services companies with operations in over 65 countries. The Trust's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact ING Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at Stacey.parker@ingfunds.com

Publisher Name: Business Wire
Company Names: *ING Group N.V.; ING Prime Rate Trust
Geographic Names: *4EUGE (Germany)
Industry Names: BUS (Business, General); BUSN (Any type of business)

66/9/17 (Item 17 from file: 16)
09694208 Supplier Number: 84447550

PPR - $.0385 March Dividend.

Business Wire , p 0190
April 5 , 2002
Language: English Record Type: Fulltext
Document Type: Newswire ; Trade
Word Count: 471

Text:

Business Editors

PHOENIX--(BUSINESS WIRE)--April 5, 2002

ING Prime Rate Trust (NYSE: PPR), a diversified closed-end management investment company listed on the New York Stock Exchange, declared a 3.85 cents per **share** monthly dividend on March 28, 2002 for the 31 days of March, payable on April 22, 2002 to shareholders of record on April 10, 2002. This represents the 167th consecutive monthly dividend since the Trust's inception in May 1988.

The following are annualized distribution rate calculations based on the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
March 28, 2002	$ .0385	6.24%	6.57%
February 28, 2002	$ .0385	6.97%	7.41%
January 31, 2002	$ .041	6.61%	7.08%
December 21, 2001	$ .042	6.82%	7.45%
November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%
September 30, 2001	$ .047	7.61%	8.25%
August 31, 2001	$ .052	7.96%	8.11%
July 31, 2001	$ .054	8.19%	8.43%
June 30, 2001	$ .054	8.42%	8.57%
May 31, 2001	$ .058	8.71%	8.85%
April 30, 2001	$ .060	9.30%	9.38%

ING Prime Rate Trust was the first fund to invest in a portfolio of senior secured floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of capital.

The Trust is managed by ING Investments, LLC, and distributed by ING Funds distributor, Inc. The Trust and distributor are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE: ING), one of the world's leading financial services companies with operations in

over 65 countries. The Trust's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact ING Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at Stacey.parker@ingfunds.com

Publisher Name: Business Wire
Company Names: *ING Group N.V.; ING Prime Rate Trust
Geographic Names: *4EUGE (Germany)
Industry Names: BUS (Business, General); BUSN (Any type of business)
Special Features: COMPANY

66/9/18 (Item 18 from file: 16)
09663758 Supplier Number: 84193300

RoboGroup Announces Increased Revenues and Backlog, Progressive Business Developments for 2001.
PR Newswire , p NYTU09226032002
March 26 , 2002
Language: English Record Type: Fulltext
Document Type: Newswire ; Trade
Word Count: 1726

Text:

ROSH HA'AYIN, Israel -- RoboGroup T.E.K. Ltd. , today reported a 29% increase in 2001 revenues to NIS 82.2 million ($18.6 million), compared with NIS 63.8 million ($14.4 million) in 2000.

Cost of revenues for 2001 was approximately 60% of revenues, compared with 57% of revenues in 2000. The increase in the cost of revenues resulted mainly from a different product mix and a decrease in the sales of the

Company's product with higher gross margins.

The Company's operating expenses in 2001 totaled NIS 39 million ($8.8 million), compared with NIS 26.7 million ($6 million) in 2000.

Net research and development expenses increased by NIS 5.1 million ($1.2 million), to NIS 11.8 million ($2.7 million) compared with NIS 6.7 million ($1.5 million) for 2000. The increase was mainly the result of increased investments in the development activities of MemCall, which totaled NIS 4.8 million ($1.1 million) in 2001, compared with NIS 0.9 million ($0.2 million) in 2000.

Marketing and selling expenses in 2001 increased by NIS 5 million ($1.1 million) to NIS 15.2 million ($3.4 million) compared with NIS 10.2 million ($2.3 million) in 2000 mainly due to an increase in marketing and selling expenses in Intelitek Inc., which stemmed from the acquisition of the Light Machine production line.

General and administrative expenses in 2001 increased by NIS 2.3 million ($0.5 million) to NIS 12.1 million ($2.7 million) compared with NIS 9.8 ($2.2 million) in 2000, mainly due to its activities in the business development field and the reorganization of the Company.

The Company's net loss in 2001 was approximately NIS 2.3 million ($0.5 million) compared with a **profit** of NIS 0.1 million ($19,000) in 2000. The NIS 2.4 million ($0.5 million) decrease resulted mainly from a NIS 5.4 million ($1.2 million) increase in costs from the activities of MemCall and e-learning from the previous year.

Mr. Aravot noted that if the Company's investments in MemCall and e-learning were excluded, RoboGroup would have posted a net **profit** of more than $1 million for 2001.

The Company's order backlog at the end of 2001 was approximately NIS 23.6 million ($5.3 million) compared to approximately NIS 18.4 million ($4.2 million) at December 31, 2000.

In October of this year, the educational sector of RoboGroup began implementing cost-cutting measures to improve profitability. These measures resulted in a decrease in expenses in the amount of NIS 1.1 million ($0.2 million) in the fourth quarter of 2001 and the educational sector reduced its loss for the year to $0.2 million from $0.9 million in 2000. Management estimates that cost cutting will result in further savings of more than $1 million in 2002. In addition, the Company announced that it has also pursued cost cutting measures across all of its other operating sectors.

YET's **profit** for 2001 was NIS 5.4 million ($1.2 million) compared to NIS 3.8 million ($0.9 million) for 2000. The Company's **profit** from YET's activities in 2001 was approximately NIS 2.6 million ($0.6 million), compared to NIS 5.9 million ($1.3 million) in 2000.

In June 2001, YET received a commitment from Yaskawa Electric Corporation ("YEC"), whereby YEC will purchase from YET products and receive research and development services in such volumes, where YET would realize a pre-tax **profit** of approximately $1.4 million in 2001 and approximately $2 million in 2002. The working plan that was approved by the board of directors for 2002 forecasts a pre-tax **profit** of approximately $1.75 million, instead of approximately $2 million as aforesaid. It was further agreed between the shareholders that YET will start developing new independent marketing channels for selling its products, and will develop products that will be sold under the brand name of YET.

During the second half of 2001 and the first quarter of 2002 YET began implementing these resolutions and recruited two managers of business development for developing marketing and sales channels in the US, Europe and the Far East, as well as a sales and marketing officer for developing marketing and sales channels in Israel. YET started to develop a product that will be sold under the YET brand and will be produced solely by YET.

In May 2000, a service agreement was entered into by RoboGroup and YET, which stipulates that YET will pay RoboGroup for services and management fees. The sum of each year's payment will be determined in an agreement that will be entered by the parties on an annual basis. For the

year 2001, YET paid RoboGroup NIS 1.9 million ($0.4 million) for services and management fees. In January 2002 a service agreement was entered into by RoboGroup and YET with respect to 2002, whereby YET will pay RoboGroup NIS 1.2 million ($0.3 million) for services and management fees.

The Company's building contributed NIS 2.7 million ($0.6 million) to the Company's **profit** compared to NIS 3 million ($0.7 million) for 2000.

MemCall continues to develop its technology, which, if successful, would in the estimation of its managers, substantially reduce the time for locating and retrieving data in computers and communications networks. The product of the new technology is expected to be a development of electronic chips.

In 2001 MemCall appointed a Vice President of Research and Development who has broad experience in the development of electronic chips and during the third quarter of 2001 a Vice President for business development was hired to create and develop business ties with potential customers and strategic partners. To date, MemCall has signed non-binding letters of intent with two potential customers.

Through 2001 and the first quarter of 2002 MemCall has been taking measures for raising capital from outside entities. MemCall's management expects that these measures, which may not succeed, might take a substantial amount of time, mainly due to current conditions in the global markets. The date when the first products of MemCall will be ready depends on the time required to raise additional capital required by MemCall. Until such time, the point in time when MemCall will produce its first products cannot be estimated.

On November 28, 2001, RoboGroup's board of directors acknowledged that MemCall met the milestones for continued investment of up to $2.5 million. RoboGroup's board of directors also resolved on February 7, 2002 to allow an increase of the **investment** in MemCall by additional $0.5 million, based on the **discretion** of the members of RoboGroup's board of directors committee for MemCall.

In 2001 the Company invested in e-learning activities and conducted negotiations with respect to projects in a number of countries. In December 2001 the Company signed an agreement for providing an e-learning system for more than $4 million. The e-learning system to be delivered under the said agreement will incorporate content related to the RoboGroup's core expertise in engineering and manufacturing technology training systems. The project is expected to take up to two years. The first products in the framework of the project are expected to be ready in the course of the coming months. The Company estimates that a successful completion of the project would lay the foundations for the Company's product-line in the field of e-learning.

"2001 was a year of progress on many fronts," commented Mr. Aravot. "We continue to develop YET, MemCall and our newly formed e-learning business as part of our commitment to add value to the group and to build shareholder value. As we further invest in these ventures, we are also dedicated to streamlining costs and improving profitability."

A complete board of directors' report for 2001 is available on the Company's website, http://www.robo-group.com/, or upon request from Rachel Levine at The Anne McBride Co. at 212-983-1702.

RoboGroup engages in three business sectors. The first focuses on new high tech ventures such as Memcall, a fabless VLSI semiconductor developer with unique Call Out Memory(TM) technology and e-learning. The second is comprised of Yaskawa Eshed Technology (YET), a joint venture with Japan's Yaskawa Electric Corp., which provides industrial motion controls. The third sector is devoted to RoboGroup's training products. RoboGroup is a world leader in engineering and manufacturing technology training systems. The Company is market driven, deriving its growth from technological leadership, strong partnerships and management expertise. For more information, visit http://www.robo-group.com/.

To the extent that this press release discusses expectations about

market conditions or about market acceptance and future sales of the Company's products, or otherwise makes statements about the future, such statements are forward-looking and are subject to a number of risks and uncertainties that could cause results to differ materially from the statements made. These factors include the rapidly changing technology and evolving standards in the industries in which the Company and its subsidiaries operate, risks associated with the acceptance of new products by individual customers and by the market place and other factors discussed in the business description and management discussion and analysis sections of the Company's Annual Report on Form F-20.

RoboGroup T.E.K. Ltd.
Summarized Consolidated Statement of Income
(Consolidated Translation into US$)

	Year ended Dec 31 2001 US$(K) (Audited)	Year ended Dec 31 2000 US$(K) (Audited)	Year ended Dec 31 1999 US$(K) (Audited)
Revenue, net	18,626	14,448	13,004
Cost of Revenue	11,118	*8,205	*7,277
Gross profit	7,508	6,243	5,727
Research and development net costs	2,674	*1,521	*1,106
Marketing and selling expenses	3,431	2,310	2,405
Administrative and general expenses	2,731	2,209	1,626
Total operating expenses	8,836	6,040	5,137
Operating income (loss)	(1,328)	203	590
Financial Income (expenses)	417	315	(360)
Other income	587	305	244
Income (loss) before taxes	(324)	823	474
Taxes on income	(192)	(120)	(19)
Company share in losses of affiliate company	--	(220)	(67)
Income before accumulated effect for prior years because of changes in accounting policy	(516)	483	388
Accumulated effect for prior years because of changes in accounting policy	--	(464)	--
Net income (Loss)	(516)	19	388
Net income per share before accumulated effect for prior			

years because of changes in

accounting policy (0.05) 0.05 0.04

Net income (Loss) per **share**

(0.05) 0.002 0.04

* Reclassified

NOTES:

The financial statements at December 31, 2001 have been translated into US dollars solely for the convenience of the American reader.

This translation was made at the US dollar to the New Israeli Shekel exchange rate in effect on the mentioned date, that is, US$ 1 = NIS 4.416.

The net earnings (loss) per **share** for the reported periods in these reports has been calculated in accordance with generally accepted accounting principles in Israel and USA.

RoboGroup T.E.K. Ltd.

Summarized Consolidated Balance Sheet

(Consolidated Translation into US$)

	December 31, 2001	Dec 31, 2000
	US$ (K)	US$ (K)
	(Audited)	(Audited)
Assets		
Current assets		
Cash and cash equivalents	2,443	3,321
Short term investments	461	443
Trade receivables	5,349	4,324
Receivables and debit balances	823	803
Inventories	3,769	4,900
Deferred Taxes	81	62
	12,926	13,853
Long term loans, investments and receivables		
Long term receivables and other investments	23	57
Fixed assets, net	8,624	8,596
Other assets	250	283
	21,823	22,789
Liabilities and Capital		
Current liabilities	9,651	6,814
Long term bank loans	1,983	4,988
Severance pay, net	315	901
Shareholders equity	9,874	10,086
	21,823	22,789

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Contact: Lisa Hod of RoboGroup T.E.K. Ltd., +972-3-900-4170, or lisah@robotec.co.il; Rachel Levine of The Anne McBride Co., +1-212-983-1702 or rlevine@annemcbride.com, for RoboGroup T.E.K. Ltd.
Website: http://www.robo-group.com/

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March 6 , 2002
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Text:

Business Editors

PHOENIX--(BUSINESS WIRE)--March 6, 2002

ING Prime Rate Trust (NYSE: PPR), a diversified closed-end management investment company listed on the New York Stock Exchange, declared a 3.85 cents per **share** monthly dividend on February 28, 2002 for the 28 days of February, payable on March 22, 2002 to shareholders of record on March 11, 2002. This represents the 166th consecutive monthly dividend since the Trust's inception in May 1988.

The following are annualized distribution rate calculations based on the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
February 28, 2002	$ .0385	6.97%	7.41%
January 31, 2002	$ .041	6.61%	7.08%
December 21, 2001	$ .042	6.82%	7.45%
November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%
September 30, 2001	$ .047	7.61%	8.25%
August 31, 2001	$ .052	7.96%	8.11%
July 31, 2001	$ .054	8.19%	8.43%
June 30, 2001	$ .054	8.42%	8.57%
May 31, 2001	$ .058	8.71%	8.85%
April 30, 2001	$ .060	9.30%	9.38%
March 31, 2001	$ .065	9.65%	9.66%

ING Prime Rate Trust was the first fund to invest in a portfolio of senior secured floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of capital.

The Trust is managed by ING Investments, LLC, and distributed by ING Funds distributor, Inc. The Trust and distributor are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE: ING), one of the world's leading financial services companies with operations in over 65 countries. The Trust's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact ING Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at Stacey.parker@ingfunds.com

Publisher Name: Business Wire
Company Names: *ING Group N.V.; ING Prime Rate Trust
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Recent court decisions

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Abstract:

Recent court decisions involving insurance- and risk-related issues are discussed.

Text:

SUPREME COURT HOLDS THAT STATE STATUTE PROVIDING FOR REVOCATION OF FORMER SPOUSE AS LIFE INSURANCE BENEFICIARY IS PREEMPTED BY ERISA

Egelhoff v. Egelhoff, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (U.S. Supreme Court-- March 21, 2001)

A State of Washington statute provides that the designation of a spouse as the beneficiary of a nonprobate asset is automatically revoked by operation of law upon divorce. The statute and its applicability to life insurance provided by an employee benefits plan subject to ERISA (the Employee Retirement Income Security Act) became the subject of the U.S. Supreme Court's latest foray into the field of ERISA preemption. The Court found that the state statute preempted under the circumstances of the case, notwithstanding that distribution of marital assets is a traditional state function not ordinarily regulated by the federal government.

Donna Rae and David Egelhoff were once married. David was an employee of Boeing, the large aircraft manufacturer, which provided him with both a life insurance policy and a pension plan. Because these were employer-provided benefits plans, they were governed by ERISA. In April 1994, the Egelhoffs divorced. David was in a car accident two months later and died within months, creating the dispute that led to this decision.

At the time of David's death, Donna Rae continued to be the listed beneficiary under both the life insurance policy and the pension plan. The life insurer paid her benefits of $56,000. David's children from a prior marriage (and his heirs under the state intestacy statute) sued Donna Rae in Washington state court seeking to recover the life insurance **proceeds**. They based their claim on Wash. Rev. Code 11.07.010(2)(a)(1994), which provides:

If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse is revoked. A provision affected by this section must be interpreted, and the nonprobate assets affected passes, as if the former spouse failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity.

The statute defines "nonprobate assets" to include life insurance policies and pension benefits.

In other words, former spouses cease being beneficiaries for these types of assets to protect against a former spouse unwittingly leaving this property to an ex-spouse simply because of a failure to remember to change the beneficiary. If an ex-spouse wishes to leave this sort of property to the other ex-spouse, the statute is designed to force a new beneficiary designation so that property is not unwittingly given to a former spouse who is now the object of enmity rather than affection. Similarly, as one might intuit from the suit of the Egelhoff children, the statute seeks to reduce the possibility that a former spouse will receive funds that the decedent ex-spouse might well have preferred go to his or her children.

The Washington courts, including the state supreme court, found for the Egelhoff children and against Donna Rae, who had raised a defense of ERISA

preemption to the suit, arguing that the state law could not govern the federally regulated Boeing employee benefits plan. ERISA provides in part that any state law "relating to" a covered benefits plan is preempted. The Washington Supreme Court found no preemption, holding that the statute was not sufficiently connected to the ERISA plan and that the statute did not substantially interfere with the operation of ERISA plans to warrant preemption. See In re Estate of Egelhoff, 93 Wash. 2d 557, 989 P.2d 80 (1999). Courts had divided over the issue, prompting the U.S. Supreme Court to consider the issue. Compare Emard v. Hughes Aircraft Co., 153 F.3d 949 (9th Cir. 1998) (finding, like Washington Supreme Court, that there is no ERISA preemption) with Manning v. Hayes, 212 F.3d 866 (5th Cir. 2000) (finding preemption); Metropolitan Life Ins. Co. v. Hanslip, 939 F2d 904 (10th Cir. 1991) (same).

The U.S. Supreme Court reversed, finding the state statute preempted. The statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status.

One of the principal goals of ERISA is to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." Uniformity is impossible, however, if plans are subject to different legal obligations in different states.

The Washington statute at issue here poses precisely that threat. Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. Instead, they must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been "revoked" by operation of law. And in this context the burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one state, the plan participant lives in another, and the participant's former spouse lives in a third. In such a situation, administrators might find that plan payments are subject to conflicting legal obligations.

The Court was unmoved that the Washington statute protects plan administrators from liability for erroneous payment of benefits to a former spouse unless the administrator had "actual knowledge" of the divorce or other invalidation of the marriage. Id. at *15. The Court was, however, concerned with one of the Egelhoff children's arguments that, if ERISA preempted the revocation of ex-spouse as beneficiary statute, ERISA must also preempt other state laws such as those that prevent a beneficiary from collecting benefits after murdering a testator or insurance holder. The Court dodged the issue but suggested it would draw a line separating the Washington law from the "slayer" statutes if necessary in a subsequent case.

In the ERISA context, these slayer statutes could revoke the beneficiary status of someone who murdered a plan participant. Those statutes are not before us, so we do not decide the issue. We note, however, that the principle underlying the statutes-which have been adopted by nearly every state-is well established in the law and has a long historical pedigree predating ERISA. See, e.g., Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (the famous New York case that refused to award benefits under a will as written where the beneficiary had murdered the maker of the will). And because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.

121 S. Ct. at 1330.

Justices Scalia and Ginsburg concurred in the result, primarily to reiterate the view they have expressed in earlier cases that ERISA

preemption should be decided according to ordinary preemption principles rather than solely by focus on the "relate to" language of ERISA's preemption provision. 121 S.Ct. at 1330-31.

Justices Breyer and Stevens dissented, arguing that the Washington statute did not interfere with the Boeing plan (or ERISA, for that matter) in a sufficiently significant way to warrant preemption. 121 S.Ct. at 1331. According to the dissenters, David Egelhoff's Boeing plan did not specifically address the issue of whether the decedent employee's benefits should go to the former spouse or to the former spouse's heirs-- at-law. Therefore, argued Justice Breyer, it should not violate ERISA for state law to provide an answer to the question. The dissent emphasized the degree to which family property division was historically a matter regulated by the states and expressed concern that the Court was federalizing this area of the law when Congress had not intended such a result. The dissent was also concerned about the equities of the case.

In forbidding Washington to apply that assumption (of revoking the ex--spouse's designation as beneficiary) here, the Court permits a divorced wife, who already acquired, during the divorce proceeding, her fair **share** of the couple's community property, to receive in addition the benefits that the divorce court awarded to her former husband. To be more specific, Donna Egelhoff already received a business, an IRA account, and stock; David received, among other things, 100% of his pension benefits. David did not change the beneficiary designation in the pension plan or life insurance plan during the six-month period between his divorce and his death. As a result, Donna will now receive a windfall of approximately $80,000 at the expense of David's children. The State of Washington enacted a statute to prevent precisely this kind of unfair result. But the Court, relying on an inconsequential administrative burden, concluded that Congress required it.

121 S. Ct. at 1334 (emphasis in original, citations omitted).

The dissenters also argued that the Egelhoff holding was in tension with the Court's other ERISA preemption cases of recent vintage.

U.S. SUPREME COURT RULES ARBITRATION AGREEMENT NOT DEFECTIVE MERELY BECAUSE IT FAILS To SPECIFY RELATIVE RESPONSIBILITIES OF THE PARTIES FOR PAYING COST OF ARBITRATION

Green Tree Financial Corporation-Alabama v. Randolph, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed. 2d 373 (U.S. Supreme Court-December 11, 2000)

Larketta Randolph purchased a mobile home in Opelika, Ala., and financed the purchase through Green Tree Financial Corporation's Alabama subsidiary. The sales contract required Randolph to buy "Vendor's Single Interest insurance, which protects the vendor or lienholder against the costs of repossession in the event of default." The agreement also provided that "all disputes arising from, or relating to, the contract, whether arising under case law or statutory law, would be resolved by binding arbitration." 121 S.Ct. at 518.

The agreement was silent on the question of who would pay the costs of the arbitration, such as filing fees and arbitrator's costs, and was similarly silent as to the amounts of those fees. The lower federal appellate court was concerned that substantial arbitration costs could be imposed and thus materially inhibit Randolph's ability to protect her statutory rights. The U.S. Supreme Court found that this silence did not make the agreement unenforceable. "The 'risk' that Randolph will be saddled with prohibitive costs is too speculative [based on the record of the case] to justify the invalidation of the arbitration agreement." 121 S.Ct. at 522.

The Court also concluded that a trial court order directing an arbitration to proceed was a final decision that was then appealable under the appellate doctrines of the federal courts. 121 S.Ct. at 519-21.

MINNESOTA PERMITS HMOs To SUE TOBACCO COMPANIES WITHOUT NEED TO BE PURCHASER OF PRODUCTS OR TO PROVE RELIANCE ON COMPANY STATEMENTS; HMOs MAY SEEK PAYMENTS FROM TOBACCO COMPANIES FOR AMOUNTS EXPENDED IN HEALTH CARE BASED ON ALLEGED MISREPRESENTATION UNDER STATE SALES LAWS

Group Health Plan, Inc., v. Philip Morris, Inc., et al., 621 N.W.2d 2 (Minnesota Supreme Court-January 11, 2001)

The saga of claims against cigarette manufacturers continues. In the late 1990s, an alliance of state attorneys general brought claims against the major tobacco companies seeking reimbursement for public health funds spent on smoking-related diseases. The result was a multibillion-dollar settlement, including a large award of counsel fees for many of the lawyers who represented states on a contingency fee basis and often advanced their own funds to prosecute the litigation on behalf of the states. Minnesota did not participate in the omnibus settlement but instead went to trial against the tobacco companies and prevailed, arguably obtaining more funds than it would have gained as its **share** under the almost global state settlement.

But that is only the government-vs.-tobacco part of the story. In the aftermath of that litigation, private health providers such as insurers, health maintenance organizations (HMOs), and Blue Cross-Blue Shield plans have moved to bring similar reimbursement actions against cigarette manufacturers. One such action has been brought by major Minnesota-based HMOs in federal district court. In response to defense objections to the propriety of such claims, the federal court certified two questions for review by the Minnesota Supreme Court.

A "certified" question takes place when a federal court asks the relevant state supreme court to render a pronouncement on a matter of state substantive law so that the federal court may be properly informed of the correct applicable law. Although much federal court litigation involves federal law (the Constitution, U.S. statutes, international treaties, etc.), a good deal of the disputing in federal court is lodged in these courts because the litigants are from different states. But the controlling law is then usually the state law of the state with the closest connection to the controversy. Thus, the U.S. district court asked the Minnesota Supreme Court for guidance on the following two questions:

1. Must a private plaintiff bringing a claim of misrepresentation have been a purchaser of the product to have the right to bring a claim? The question was of course important because the HMOs were not asserting that they used cigarettes and became diseased (try to imagine an HMO with lung cancer). Rather, the HMO claimed that many of its patients smoked, became afflicted with tobacco-related diseases, and required medical care, causing injury to the HMOs.

2. To prevail in a misrepresentation action, must a private plaintiff prove that it relied on inaccurate statements made by the defendant? Again, the HMO entities were of course not arguing that they were lured into smoking by false information or concealment of health hazards. Rather, the HMOs argued that their patients were the victims of industry misrepresentation, became ill, required extra health care, and caused economic damage to the HMOs.

The Minnesota Supreme Court answered both questions in favor of the HMOs suing the tobacco companies. See 621 N.W.2d at 2-3 2001 Minn. LEXIS 3 at

*2-*3. A medical provider plaintiff, at least in Minnesota, is permitted to sue a product manufacturer without having itself purchased the product or relied upon the manufacturer's statements about the product. "It will be necessary, however, for plaintiffs to prove a causal nexus between the conduct alleged to violate [the statutes] and the damages claimed." 621 N.W.2d at 3.

The claims at issue are based on the state's statutes concerning misrepresentation in the sale of a product. The court relied extensively on the legislative history of the statutes. See 621 N.W.2d at 9-10. However, many other states have similar statutes, which suggests that other states addressing the question may well align with Minnesota on the issue. See, eg., Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 448 N.E.2d 357 (Mass. 1983) (Massachusetts Supreme Judicial Court takes similar view of similar statute in case relied upon by Minnesota court in Group Health [see 621 N.W.2d at 10-11]).

To some extent, the decision was foreshadowed. The state supreme court had previously found that Blue Cross and Blue Shield of Minnesota was entitled to sue the tobacco companies, making identical claims. See State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996).

The tobacco defendants attempted to avoid the Humphrey precedent by arguing that the term person in the relevant statutes logically means consumers and not merchants, such as an HMO. The court rejected this defense, finding that entities injured by a misrepresentation qualified as "persons" entitled to sue if the facts supported the claim. See 621 N.W.2d at 9-10.

PENNSYLVANIA SUPREME COURT, AFTER REMAND FROM U.S. SUPREME COURT, REAFFIRMS DECISION THAT ACTIONS AGAINST HMOs FOR NEGLIGENT FAILURE TO AUTHORIZE TREATMENT ARE NOT PREEMPTED BY ERISA, BUT FEDERAL APPEALS COURT SITTING IN PHILADELPHIA REACHES OPPOSITE CONCLUSION IN CASE WITH SIMILAR FACTS
Pappas v. Asbel, 564 Pa. 407, 768 A.2d 1089 (Pennsylvania Supreme Court-April 3, 2001)

Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266 (U.S. Court of Appeal, Third Circuit-- March 27,2001).

In a decision reconsidered because of an intervening U.S. Supreme Court decision, the Pennsylvania Supreme Court held that a claim against a health maintenance organization (HMO) for failing to authorize treatment of a patient could be maintained under state law. At 11 a.m. on May 21, 1991, Basil Pappas was admitted to Haverford Community Hospital in the Philadelphia suburbs and diagnosed with an epidural abscess creating pressure on his spinal cord.

The treating physician regarded this as a neurological emergency and recommended that Pappas be immediately transferred to Jefferson University Hospital in Philadelphia. An ambulance arrived at 12:40 p.m. But at that point, U.S. Healthcare, the HMO that insured Pappas, denied authorization for treatment at Jefferson, apparently because it was not a participating hospital in Pappas's U.S. Healthcare plan. The doctor protested and by 1:05 p.m., U.S. Healthcare responded, continuing to deny treatment at Jefferson but to permit transfer of the patient to either Hahnemann or Temple University hospitals. Pappas was eventually taken to Hahnemann by 3:30 p.m. The pressure on his spinal cord caused permanent quadriplegia, prompting Pappas to sue both his primary doctor for medical malpractice and Haverford for inordinate delay in treatment.

Haverford brought U.S. Healthcare into the action with a third-party complaint, alleging that the HMO's refusal to authorize the original planned referral to Jefferson Hospital was a significant part of the delay

that in significant part led to the tragedy. U.S. Healthcare raised the defense of ERISA preemption, arguing that it could not be sued under state tort law because Pappas was covered pursuant to an employee benefits plan that was subject to ERISA preemption. U.S. Healthcare argued that ERISA's broad preemption clause stating that any law "relating to" a plan was preempted barred the Pappas action.

The Pennsylvania Supreme Court rejected the preemption defense in its first opinion. See Pappas v. Asbel, 555 Pa. 342,724 A.2d 889 (Pa. 1998). U.S. Healthcare, by now part of Aetna, sought review by the U.S. Supreme Court. The High Court remanded the case to Pennsylvania for reconsideration in light of Pegram v. Herdrich, 530 U.S. 211,120 S.Ct. 2143, 147 L.Ed.2d 164 (June 12, 2000). In Pegram, the Court held that HMOs making medical treatment decisions or "mixed" decisions regarding coverage and treatment were not "fiduciaries" under ERISA and hence were not subject to the fiduciary liability sections of ERISA. However, the Pegram Court did strongly suggest that HMOs acting in this capacity were also outside the protection provided by ERISA's preemption provisions.
Certainly, this was the view of the Pappas Court, which reaffirmed its earlier ruling after discussing Pegram. See 768 A.2d at 415. The Pappas Court also reviewed the U.S. Supreme Court's ERISA preemption jurisprudence, which it continued to regard as moving away from the earlier ERISA jurisprudence of extremely broad preemption toward more traditional, restrained notions of preemption. See 768 A.2d at 1092-93. The Pappas Court was aware that plaintiff Herdrich in the Pegram case has been permitted to pursue a medical malpractice action in Illinois state court, where the claim arose, and that the Pegram v. Herdrich facts were analogous to those of Pappas. Herdrich was receiving treatment for abdominal pains but was required to wait for treatment and to go to a hospital selected by the HMO. During the interim delay, Herdrich's appendix ruptured. In light of the medical treatment decisions at issue in Pappas (and Pegram for that matter), the Pappas Court rejected the HMO's argument that U.S. Healthcare had made only a coverage determination in refusing to permit the transfer to Jefferson Hospital. See 768 A.2d at 1097-98.

In lone dissent, Justice Saylor argued that Pegram does not clearly authorize such negligence actions against the HMO even if malpractice actions against the doctor are permitted without ERISA preemption. "Although it has been suggested that the reasoning from Pegram II [the U.S. Supreme Court opinion] has effectively overruled the latter line of decisions [finding preemption], reserving ERISA preemption exclusively for the narrow category of claims implicating pure eligibility determination by an HMO unrelated to medical diagnosis and decision-making, the assessment in the aftermath of Pegram II has remained mixed." 768 A.2d at 1097-98.

Justice Saylor's statement is correct as far as it goes. However, the majority of scholars have with near uniformity analyzed Pegram as overruling precedent that had barred claims against the HMO for decisions impacting medical treatment. See Jeffrey W. Stempel and Nadia von Magdenko, ERISA, HMOs and the Public Interest After Pegram v. Herdrich, 36 TORT & INS. L.J. 687 (2001); James J. Brudney, The Changing Complexion of Workplace Law: Labor and Employment Decisions of the Supreme Court's 1999-2000 Term, 16 LAB. LAw. 151, 195 (2000); Thomas R. McLean, M.D., and Edward P Richards, Managed Care Liability for Breach Fiduciary Duty After Pegram v. Herdrich: The End of ERISA Preemption for State Law Liability for Medical Care Decision Making, 53 FLA. L. REV. 1, 19-45 (2001). On a related front of ERISA preemption and health insurer liability, courts also appear with increasing frequency to be permitting bad faith actions against HMOs providing coverage pursuant to an ERISA plan. In Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed. 2d 39 (1987), the U.S. Supreme Court found that Louisiana's bad faith cause of action was preempted by ERISA because it "related to" an ERISA plan but was not

"specifically directed to the insurance industry." Although bad faith actions against noninsurers are rare in Louisiana, the tort is technically available against other parties.
But where a state's bad faith cause of action is limited to insurance, courts have found Pilot Life not to control and that ERISA is not a bar to the action because ERISA specifically saves from preemption state laws regulating insurance. See, eg., Gilbert v. Alta Health & Life Ins. Co., 122 F. Supp.2d 1267; Hill v. Blue Cross Blue Shield of Alabama, 117 E Supp.2d 1209 (N.D. Ala. 2000); Lewis v. Aetna U.S. Healthcare, 78 F. Supp.2d 1202 (N.D. Okla. 1999). But see Greene v. Well Care HMO, Inc., 778 So. 2d 1037 (Fla. App. 4th Dist.-February 14, 2001) (Florida does not permit bad faith cause of action against HMOs, as they are specifically exempted from the relevant section of state insurance code). The decisions permitting bad faith actions against health insurers have been spurred in part and supported by Unum Life Ins. Co. v. Ward, 526 U.S. 358, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999), which held that California's rule that late notice invalidated insurance coverage only if the insurer was prejudiced by the delay was a law regulating insurance within the meaning of ERISA's savings clause.

Reading Pegram, Pappas, and the scholarly commentary, one might think that today, an HMO is not immunized by ERISA whenever it is making a decision that in some way affects a patient's medical care-but that is not quite correct, as demonstrated by Pryzbowski v. U.S. Healthcare, Inc., 245 E3d 266 (3d Cir. 2001).

In Pryzbowski, the U.S. Court of Appeals for the Third Circuit (which includes Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands) found ERISA to preempt a claim against an HMO arising out of its refusal to agree to let the patient be treated by surgical specialists at an "out-of-network" hospital. The Pryzbowski Court regarded this as an administrative decision by the HMO rather than as a mixed question of coverage eligibility and medical treatment.

Pryzbowski began experiencing severe back pains in late 1993 and sought treatment from her regular primary care physician. She had undergone back surgery in the past, which had been covered by her previous health care plan. After investigation, her doctor requested that she consult with the neurosurgeon who had performed a prior surgery. However, this neurosurgeon was not a participant in the U.S. Healthcare plan that currently covered Pryzbowski. U.S. Healthcare approved the consultation, and the neurosurgeon

concluded that surgery was needed and that the following specialists or specialists' services were required: spinal instrumentation and fusion by a separate orthopedic surgeon, pulmonary clearance and follow-up, consultation with a pain management physician, and a psychological assessment and follow-up. The specialists to whom he referred her were also associated with Thomas Jefferson University Hospital in Philadelphia and outside the U.S. Healthcare network.

245 F.3d at 269.
U.S. Healthcare refused to approve the recommended treatment of further surgery and treatment by out-of-network doctors. But Pryzbowski did see in-network doctors specializing in pain management and mental health. Pryzbowski continued to seek the recommended out-of-network treatment, which U.S. Healthcare approved on June 30, 1994, approximately seven months after Pryzbowski first came to her doctor. Despite the surgery, she continued to suffer severe back pain. The treating neurosurgeon blamed this on "the significant delay that occurred between the onset of the symptomatology and the surgical intervention." 245 F.3d at 269-70 (quoting neurosurgeon). Pryzbowski sued her doctors and the HMO, alleging negligent and careless delay in approving urgently needed surgery. U.S. Healthcare

argued that the claims against it were preempted by ERISA as essentially "pure" administrative decisions lacking a sufficient component of medical treatment. The Third Circuit agreed.

Underlying these allegations of delay is the policy adopted by U.S. Healthcare (and many other HMOs) requiring beneficiaries either to use in-network specialists or to obtain approval from the HMO for out-of-network specialists. These activities fall within the realm of the administration of benefits.

245 F.3d at 274.

In essence, the Pryzbowski Court characterized her dispute with the HMO as one involving denial of benefits rather than as a decision touching on medical treatment. The court therefore followed a line of precedent finding preemption (most of it preceding the U.S. Supreme Court's June 2000 decision in Pegram v. Herdrich) rather than the line of precedent finding no preemption where the HMO is accused of making decisions that adversely affect the quality of health care rather than eligibility for care (the "quantity" of care, in the words of some courts).

The rationale for these holdings (finding preemption) is that the decision whether a requested benefit or service is covered by the ERISA plan falls within the scope of the administrative responsibilities of the HMO or insurance company, and is therefore "related to" the employee benefits plan.

In contrast, claims challenging the quality of care not preempted (by ERISA).

245 F.3d at 278-79.

Reading Pappas and Pryzbowski together creates more than a little impression of inconsistency among the courts. Pappas allegedly suffered injury because of a 3- to 4-hour delay in obtaining HMO approval for surgery in a conflict over whether the HMO would pay for treatment at a particular facility by particular physicians. Pryzbowski allegedly suffered injury because of a 6- to 7-month delay in obtaining HMO approval for surgery in a conflict over whether the HMO would pay for treatment at a particular facility by particular physicians. One would expect the cases to either both be preempted by ERISA or neither be preempted by ERISA. Although one can attempt to differentiate the facts to harmonize the results of these two cases, this is an exercise in legal cleverness more than an adequate explanation. The Pennsylvania Supreme Court and the Third Circuit simply have taken different views as to what constitutes "plan administration" and a "mixed" question of medical treatment. So, too, will other cases until a majority rule emerges or the Supreme Court again intervenes.

My view is that the Pappas Court has made the correct post-Pegram analysis. HMO authorization decisions that involve a decision about the necessity for out-of-network treatment or the most appropriate facility for treatment are usually inherently mixed decisions of medicine and administration because they turn in part on determining whether medical treatment imperatives justify treatment outside the HMO network. The better reading of Pegram is that these types of decisions sound more in medical negligence than plan administration and should not be preempted by ERISA. Pappas is correct. Pryzbowski is wrong.

Recall that in Pryzbowski, there was no question that the patient was a covered member of the HMO plan. The question was whether her afflictions justified the recommended treatment by out-of-network physicians. In making

this determination, the typical HMO decides based on the nature of the medical situation and the relative wisdom of using in-network or out-of-network doctors and hospitals. There is no question that the patient, under the appropriate circumstances, is entitled to out-of-network care, usually based on whether the medical condition demands it. In other words, HMOs of necessity decide the out-of-network question based in part on the HMO's assessment of the medical situation. Under Pegram, this is a mixed question (or possibly even a pure medical treatment question), and ERISA preemption should not apply. After Pegram, ERISA preempts claims of plan administration error against an HMO only when the HMO's decision is one based solely on contract without consideration of medical issues presented by the patient's case. Unfortunately, Pryzbowski may indicate that many courts are continuing to be overprotective of HMOs notwithstanding Pegrami and other cases since 1995 that have lowered ERISA's preemptive shield for health care plans.

HMOs operating under a Pappas regime rather than a Pryzbowski regime are not defenseless. If the Pryzbowski case against the HMO had been permitted to continue, U.S. Healthcare would have been entitled to raise a number of defenses, including (i) the delay was not a cause of the continued back pain; (ii) the surgery was the problem; (iii) the out-of-network doctor (who now is 0 for 2 in curing Pryzbowski's back problems) was at fault or recommended continued treatment by his team without sufficient medical justification); and (iv) in-network doctors were perfectly competent to perform the surgery, and Pryzbowski's insistence on use of out-of-network doctors is what caused the delay.

Although the HMO would undoubtedly prefer not to defend these claims at all, many would argue that HMOs should be required to defend delays or refusals concerning out-of-network care when the patient has a nonfrivolous argument that the delay was unwarranted and caused injury. ERISA was enacted as a pension benefit regulation to protect workers; it was not enacted as an immunity law for health care plans.

A lingering post-Pegram ERISA question is whether a decision of pure plan administration might be subject to the fiduciary duty obligations of ERISA, which are normally imposed on the plan, on the non-health care plan administrator, and on entities that handle the funds of an employer-provided benefits plan. Pegram clearly stated that HMOs and others that make medical or mixed treatment decisions are not acting as fiduciaries. But if the HMO is acting only to administer a plan, does it not resemble closely a bank holding plan assets or an employer determining who may obtain benefits? After Pryzbowski, lawyers making claims against an HMO may be inclined to plead both nonfiduciary claims (in hope that the court adopts a Pappas analysis) and fiduciary claims (in hope of attempting to succeed in a fiduciary duty claim if the court rejects the medical negligence claim on Pryzbowski-like grounds). But see Batas v. Prudential Ins. Co., 281 A.D.2d 260, 724 N.Y.Supp. 2d 3 (1st Dept.-March 20, 2001) (refusing to permit state law-based breach of fiduciary duty action against health plan; health insurer is not a fiduciary).

The juxtaposition of Pappas and Pryzbowski reveals the continuing judicial uncertainty over the parameters of ERISA preemption. The U.S. Supreme Court has granted certiorari to review the decision in Moran v. Rush Prudential HMO, Inc., 230 F.3d 959 (7th Cir. 2000), in which the federal appeals court in Chicago upheld (on a 2-1 vote) an Illinois statute requiring independent medical review of HMO denials of treatment. See 121 S.Ct. 2589 (June 29, 2001). Oral argument was heard in October 2001. The Court may use the Moran case not only to decide questions of state regulation but also to clarify the law of ERISA preemption in general. Commentators reviewing the Pegram decision have uniformly seen it reducing the quasi-immunity of HMOs that is provided by ERISA preemption.

The Court may use the upcoming Moran opinion to more clearly affirm or deny this interpretation of Pegram and to choose between the Pappas and Pryzbowski approaches to ERISA preemption of medical treatment decisions.

ARSON ExcLUSION VIOLATED STATUTE AND PUBLIC POLICY WHEN APPLIED TO INNOCENT COINSURED

Lane v. Security Mutual Insurance Co., 96 N.Y2d 1, 747 N.E.2d 1270, 724 N.YS.2d 670 (New York Court of Appeals-February 13, 2001)

Security Mutual issued a homeowner's policy to Joretta Lane that contained an exclusion for losses arising out of an intentional fire set by an "insured." The term included not only the named insured but also relatives living at home.

While the policy was in effect, the plaintiff's 17-year-old son intentionally set the premises on fire. Although the plaintiff's son was solely responsible for the arson, the defendant disclaimed liability base on the policy exclusion for intentional acts by "an insured."

747 N.E.2d at 1271.

The court of Appeals, New York's highest court, held the exclusion unenforceable as against Lane, who had nothing to do with her son's arson activity.

We hold that the subject exclusion impermissibility restricts the coverage mandated by statute and afforded the innocent insured. The New York standard fire insurance policy is codified in [New York] Insurance Law 3404(e). Any policy that insures against the peril of fire must incorporate "terms and provisions no less favorable to the insured than those contained in the standard policy" The standard policy exclusion provision entitled "Conditions suspending or restricting insurance" states that damages will be disclaimed "for loss occurring *** while the hazard is increased by any means within the control or knowledge of the insured." The standard policy is the minimum level of coverage permissible for an insurance company to issue.

747 N.E.2d at 1271.

The court found that a child's arson was not the result of hazard increase within the parent's control. Because Insurance Law 3404 "delineates independent liabilities and obligations as to each insured to refrain from incendiary acts," the court found it at odds with the statutes-as well as concerns of fairness and equity-that the policy attempted to strip an innocent insured of coverage. 747 N.E.2d at 1272.

The Court of Appeals opinion, although short, reads like a brief against the arson exclusion, or any exclusion punishing nonculpable policyholders. To some extent, a policyholder purchases insurance to protect not only against the negligence of household members and the outside world but also against the occasional unpredictable antisocial behavior of the members of the household. But the court stopped well short of gutting these types of exclusions across the board, holding that its decision in Lane "is limited to matters involving fire insurance, where Insurance Law 3404 is implicated." For liability insurance, exclusions taking coverage from all policyholders because of the wrongdoing of a single insured are apparently permissible in New York. See 747 N.E.2d at 1272; Allstate Insurance Co. v. Mugavero, 79 N.Y.2d 153, 589 N.E.2d 365, 581 N.YS.2d 142 (1992).

WORKERS' COMPENSATION COVERS PSYCHIATRIC INJURY; NO NEED FOR PHYSICAL

MANIFESTATIONS OR IMPACT ACCOMPANYING PSYCHIC LOSS

Bailey v. Republic Engineered Steels, Inc., 91 Ohio St. 3d 38; 741 N.E.2d 121 (Ohio Supreme Court-February 7, 2001)

Leonard Bailey was operating a tow motor when he accidentally ran over and killed a coworker at Republic Engineered Steels. Bailey became severely depressed as a result of the accident and required treatment. When he sought compensation pursuant to Ohio's workers' compensation law, he was denied at all administrative levels.

The relevant statutory section states that a compensable injury "does not include... [p]sychiatric conditions except where the conditions have arisen from an injury or occupational disease." See Ohio R.C. 4123.01(C)(1).

The Bureau of Workers' Compensation took the view that Bailey had not sustained a compensable injury as required by statute. When Bailey continued to attempt to obtain benefits, the trial court also rebuffed him. However, the intermediate court of appeals was more receptive, finding for Bailey but with a resolve uncertain enough to certify the issue for Ohio Supreme Court review. The Ohio Supreme Court clarified the reach of workers' compensation benefits when it held that "a psychiatric condition of an employee arising from a compensable injury or occupational disease suffered by a third person is compensable" under the law.

The plain reading of the statute reveals that the intent of the General Assembly is to limit claims for psychiatric conditions to situations in which the conditions arise from an injury or occupational disease. However, [the statute] does not specify who must be injured or who must sustain an occupational disease.

91 Ohio St. 3d at 40, 741 N.E.2d at 123.

After reviewing the history, theory, and purpose of workers' compensation laws (where strict liability is imposed but benefits are limited in a compromise between labor and management interests), the court concluded that the statute must be construed in favor of the claimant and at least not construed so as to add limitations on recovery that are not in the text of the statute.

The dissenters argued that the statute and the system were designed to compensate only the worker tangibly injured on the job. See 91 Ohio St. at 42; 741 N.E.2d at 125. However, the dissent does not really refute one notion at the core of the majority holding: Bailey was in fact injured in a workplace mishap; he did not develop his affliction off-site merely as a result of knowledge of a coworker's injury. Bailey was at the center of the injury and probably blamed himself for the tragedy as well. He was completely immersed in a deadly workplace mishap. As the majority reasoned, the fact that his injuries were mental rather than physical would not appear to deprive him of coverage.

Undoubtedly, employers reading a case like Bailey are concerned that the pool of compensable workers not expand too dramatically once the "lid" is off the topic of psychic injury. For example, it would seem too much if scores of workers could claim compensation merely upon hearing of an unknown coworker's death in another sector of a large manufacturing plant. But Bailey's claim was much more concrete and directly related to his role as a worker. Although cases falling between these extremes will present difficult characterization problems, courts should not have difficulty placing situations like Bailey's in the category of compensable claims and differentiating this from more attenuated or outlandish claims for compensation out of coworker sympathy.

SECURITY GUARD'S HEART ATTACK AFTER CONFRONTATION WITH HOOLIGANS IS COVERED "ACCIDENT" UNDER STATE WORKERS COMPENSATION SCHEME

Cunningham v. Shelton Security Service, Inc., 46 S.W.3d 131 (Tennessee Supreme Court-- March 1, 2001) (rehearing denied, May 2,2001)

Robert Cunningham worked as a security guard at the Little Barn Deli and Market in Nashville. During the early morning hours of March 5,1992, three young men entered the store and apparently attempted to shoplift. Cunningham confronted the men and asked them to leave. A verbal confrontation ensued and things became heated, but violence did not erupt as Cunningham escorted the three men out of the store, although they threatened to return and kill Cunningham.

When Cunningham returned to the store, he soon began complaining about feeling bad. He rubbed his arm and stated that he had a funny sensation. He went outside for a moment and fell unconscious, the victim of a heart attack. Cunningham died before his ambulance reached the hospital. An emergency room physician attributed the tragedy to "sudden cardiac death," which he attributed to the distressing nature of the confrontation. However, Cunningham's death certificate classified the death as one from "arteriosclerotic cardiovascular disease," and no autopsy was performed.

The legal issue before the court was whether Cunningham's death was the result of an "injury by accident arising out of and in the course of employment"as required by the state workers' compensation statute. See Tenn. Code Ann. 50-6-102(12) (1999). The court, reasoning from the statutory language and precedent, found that the death was sufficiently work-related and accidental to qualify for coverage. IT]he injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work." The court found that the Cunningham injury substantially originated at work and was linked to work in time and space.

[T]he rule is settled in this jurisdiction that physical or mental injuries caused by worry, anxiety, or emotional stress of a general nature or ordinary stress associated with the worker's occupation are not compensable. The injury must have resulted from an incident of abnormal and unusual stressful proportions, rather than the day-to-day mental stresses and tension to which to workers in that field are occasionally subjected.

[T]he record also reflects that the individuals chased off by the employee threatened to return and kill him. We believe that this additional circumstance makes a difference and is sufficient to warrant the conclusion that the employee's death did not result from generalized employment conditions, but from something beyond the norm, even for a security guard.

46 S.W.3d at 137.

FEDERAL APPEALS COURT HOLDS THAT CALIFORNIA HOLOCAUST VICTIM INSURANCE RELIEF ACT OF 1999 DOES NOT VIOLATE COMMERCE CLAUSE OF U.S. CONSTITUTION OR FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER

Gerling Global Reinsurance Corp. of America. v. Low, 240 EM 739 (U.S. Court of Appeals for the Ninth Circuit-February 7, 2001)

In the late 1990s, a long-slumbering issue of history and insurance emerged. Facts brought to light tended to confirm long-standing suspicions that European insurers had opportunistically seized upon the ravages of World War II and the Nazi Holocaust against the Jews to avoid paying life insurance benefits to the beneficiaries of Jewish decedents killed during the war years. State insurance commissioners held hearings and often heard

poignant stories of families losing the benefit of policies on which years of premiums had been paid.

The insurers had long argued that they could not pay benefits without documentation or other very solid proof of the existence of the claimed policies. Investigation suggested that the insurer archives knew more than the insurers had been telling. Personal testimony by survivors was credited as establishing the likely existence of policies even if the exact terms and limits were not available.

Claimants and insurers were both faced with severe problems of proof and proportionality. Protracted litigation was unlikely to benefit either side. The National Association of Insurance Commissioners (NAIC) and various state legislatures enacted NAIC-proposed model legislation designed to require insurers to provide information on policies in effect between 1920 and 1945 as a condition of remaining in good standing to do business in California. Under the statute, if a company fails to comply, the Insurance Commissioner is required to suspend the insurer's certificate of authority.

Three insurers and an industry trade organization challenged the law and sought a preliminary injunction, arguing that the Holocaust Victim Insurance Relief Act of 1999 (HVIRA) violated the Commerce Clause and the foreign affairs power of the U.S. Constitution by interfering too greatly with the interstate flow of goods and the international relations of the federal government.

The trial court granted the preliminary injunction. The U.S. Court of Appeals for the Ninth Circuit (which includes California, Oregon, Washington, Idaho, Montana, Nevada, Arizona, and New Mexico) left the injunction in place but reversed the trial court's assessment of the Commerce Clause and foreign affairs power issues. The injunction was not vacated, so that the insurers could present to the trial court the question of whether the provisions of HVIRA might violate the due process of rights of the insurers.

In reaching its decision, the Ninth Circuit found that the McCarran-Ferguson Act applied and made the dormant Commerce Clause of the Constitution inapplicable. The "dormant" Commerce Clause power prevents states from taking actions that inhibit interstate commerce. Congress uses "active" Commerce Clause power when it enacts legislation regulating states and other entities based on the Commerce Clause power. The McCarran-Ferguson Act provides, in quite strong terminology, that insurance is largely to be regulated by the states. Consequently, state insurance regulation, even if based on investigation for wrongdoing and with commerce-limiting potential penalties, was not inconsistent with the Commerce Clause and the federal structure. As to the ability to conduct foreign affairs, which normally resides in the executive branch of the national government, Congress has in fact passed the U.S. Holocaust Assets Commission Act of 1998 (22 U.S.C. 1621) to facilitate investigation of the matter and location of as many of the lost insurance policy assets as possible. Under these circumstances, there was no state usurpation of foreign policy power: "We read the Holocaust Act to embrace state legislation like HVIRA." See 240 EM at 748.

Thus, the Ninth Circuit reversed the trial court on the merits but did not dissolve the injunction. The appellate court was concerned that there may be insufficient due process if California was seeking to impose liability on insurers without sufficient contact between the state and the objects of the regulation. For that reason, no attempt was made to remove the injunction, and the case was remanded to the trial court for consideration of the due process claim.

INSURANCE COMPANY HELD LIABLE FOR $6 MILLION AND INTEREST PLUS $6 MILLION IN PLAINTIFF'S COUNSEL FEES FOR VIOLATING FIDUCIARY Dunn UNDER ERISA

Harris Trust and Savings Bank v. John Hancock Mutual Life Ins. Co., 122 F Supp. 2d 444 (U.S. District Court for the Southern District of New York-November 22, 2000) Harris Trust and Savings Bank v. John Hancock Mutual Life Ins. Co., 2001 U.S. Dist. LEXIS 3649 (U.S. District Court for the Southern District of New York-March 31, 2001)

An employer benefits plan begun in 1941 became the subject of a long-running dispute between the plan trustee and an insurance company holding some of its assets. In essence, insurer John Hancock held funds for investment as part of the retirement plan for the Sperry Rand Corporation (SRC), which later became Unisys. For a number of years, the trust was able to obtain funds held in excess of those required to meet plan obligations in what then was referred to as a "rollover procedure."

In 1982, the SRC attempted again to use the rollover procedure to withdraw accumulated free funds, but Hancock refused to let the SRC do so, citing its own cash flow needs. The SRC then attempted to withdraw accumulated free funds to pay nonguaranteed benefits, but Hancock provided notice that it would no longer pay nonguaranteed benefits under the agreement previously applied. As a consequence of Hancock's refusals to permit such access to "free funds," the only mechanism available for the SRC to withdraw free funds was the transfer provisions of GAC 50. Again, however, that was not a viable option because of the pricing scheme (which controlled such transactions based on low interest rate assumptions made decades earlier).

Hancock did not consider its obligations under ERISA to the plan when it decided to terminate the rollover procedure or the payment of nonguaranteed benefits with excess funds. Instead, it used plan assets for its own benefit: to help address its own cash flow problems, as "one more way of limiting cash outflows." In addition, by refusing to permit the withdrawal of free funds, Hancock was able to continue collecting charges on the investment income generated by these funds. There was no question that the free funds belonged to the trust; the issues confronting the parties were how to compute the amount of the excess funds, when Hancock had to give them back, and under what circumstances.

Throughout this period, Hancock assessed the trust risk charges. However, Hancock did not actually face any risk with respect to the free funds during this time period because it was "sufficiently protected" by other provisions of GAC 50 so that it was not at "material risk." Therefore, the excess risk charges collected by Hancock during this time period constituted overcompensation. 122 F.Supp.2d at 452 (citations to trial record omitted).

The court concluded that Hancock "violated its obligations [as a fiduciary] under ERISA by breaching its duty of loyalty and its duty to avoid prohibited transactions." 122 F. Supp. 2d at 459. According to the court:

Hancock refused to return Plan assets to the Trust when the Trust sought to use the rollover procedure in 1982 to withdraw accumulated free funds. The Trust felt it could get a better return by investing the excess funds elsewhere, but Hancock refused to return the Plan assets because of its cash flow problems. Instead, Hancock exercised its discretion to terminate the rollover procedures that had enabled the Trust to withdraw a total of $12 million prior to 1982. Clearly, Hancock put its own interests and cash flow needs ahead of the interests of the Plan and its beneficiaries. By doing so, Hancock violated its obligations under ERISA.

Hancock also refused to revalue the liabilities on a fair and reasonable basis. It repeatedly recognized that because of outdated interest and mortality assumptions, the liabilities [of one group annuity **investment** contract] were grossly overstated .... Hancock had the **discretion** to revalue the LOF but exercised its **discretion** in a manner that furthered its own interests and disadvantaged the interest of the Plan.

122 F. Supp. 2d at 459-60.

The court rejected Hancock's argument that its status as a mutual insurer required it to give equal consideration to its other contract holders and thus use funds to alleviate its cash flow problem rather than release funds to SRC as requested. See 122 E Supp. 2d at 462. In addition, the Court suggested that Hancock's argument was pretextual because "Hancock has maintained for years that ERISA did not apply and that it was not a fiduciary under ERISA." 122 E Supp. 2d at 462. Hancock had aggressively defended the litigation since its inception in 1983, including taking the ERISA and fiduciary duty questions to the U.S. Supreme Court, where the Trust prevailed. See John Hancock Mut. Life Ins. Co. v. Harris Trust and Savings Bank, 510 U.S. 86, 114 S.Ct. 517, 126 L.Ed. 2d 524 (1993) (holding that funds held by Hancock were assets of the SRC plan and that Hancock's management actions were to be judged by the fiduciary standards in ERISA).

In its opinion imposing liability on Hancock, the court concluded that the economic loss to the Sperry Trust, with interest, was approximately $20 million. The court also ruled that the trust was entitled to an award of counsel fees. ERISA provides that prevailing parties are ordinarily entitled to a payment of reasonable counsel fees by the losing party. The court, in its November 22, 2000, opinion instructed the parties to make submissions on the issue of the appropriate amount of fees. In its March 30, 2001, opinion, the court awarded more than $6 million ($6,365,384.85, to be precise) to plaintiff's counsel (the law firm of Anderson, Kill, and Olick). Although the amount of fees was high, the court found the award merited by the considerable effort expended by counsel and the favorable results obtained. As the court noted, the group annuity contract at issue had been entered into during 1941, requiring counsel to investigate "facts spanning five decades." In addition to the thick motion practice, appeals, and trip to the Supreme Court, there were 51 depositions taken in the case, "thousands of exhibits," and a 13-day trial. See 2001 U.S. Dist. LEXIS 3649 at *7.

The court found the rates of counsel to be reasonable and focused particularly on the hourly billing rate of plaintiff's lead counsel Lawrence Kill, whose billing rate began at $210 per hour (in 1984) and gradually increased to $500 by December 2000. Although the rate was high, the court found it in line with the standards of New York City law firms and justified by the quality of the representation as well as the result (a judgment of approximately $20 million, when interest was included). "In this extremely complicated and difficult case, the work of Mr. Kill and his colleagues was superb." Id. at *15.

Hancock undoubtedly will prosecute an appeal with the same vigor its counsel has shown throughout the case. It will be most interesting to see if the compensatory award and the award of counsel fees are upheld. Even if there is reduction-or even reversal-Harris Trust v. John Hancock should serve as a cautionary note to entities that administer ERISA plan assets. They are likely to be considered fiduciaries in their handling of plan assets. As fiduciaries, they are required to display loyalty to the plan and to put the plan's interest ahead of their own. According to the court, Hancock failed to do this by essentially "playing the float" of the time value of money in Hancock's own favor rather than that of a client who

specifically requested Hancock's help in reaping this benefit of the plan's own funds.

1Or perhaps because of Pegram. Although Pegram's holding logically suggests limited preemption by ERISA, Pegram 's rhetoric is very laudatory of the HMO concept of health care rationing and reflects concern that liability claims not undermine the economic feasibility of these types of health care plans.

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THIS IS THE FULL-TEXT.

Geographic Names: United States; US

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PPR -- $.041 January Dividend.
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Business Editors

PHOENIX--(BUSINESS WIRE)--Feb. 7, 2002

Pilgrim Prime Rate Trust (NYSE:PPR), a diversified closed-end management investment company listed on the New York Stock Exchange, declared a 4.10 cents per **share** monthly dividend on January 31, 2002 for the 31 days of January, payable on February 25, 2002 to shareholders of record on February 11, 2002. This represents the 165th consecutive monthly dividend since the Trust's inception in May 1988.

The following are annualized distribution rate calculations based on the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
January 31, 2002	$ .041	6.61%	7.08%
December 21, 2001	$ .042	6.82%	7.45%

November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%
September 30, 2001	$ .047	7.61%	8.25%
August 31, 2001	$ .052	7.96%	8.11%
July 31, 2001	$ .054	8.19%	8.43%
June 30, 2001	$ .054	8.42%	8.57%
May 31, 2001	$ .058	8.71%	8.85%
April 30, 2001	$ .060	9.30%	9.38%
March 31, 2001	$ .065	9.65%	9.66%
February 28, 2001	$ .062	9.99%	9.95%

Pilgrim Prime Rate Trust was the first fund to invest in a portfolio of senior secured floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of capital.

The Trust is managed by ING Pilgrim Investments, LLC, and distributed by ING Pilgrim Securities, Inc. ING Pilgrim companies are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE: ING), one of the world's leading financial services companies with operations in over 65 countries. ING Pilgrim's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact Pilgrim Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at sparker@pilgrimfunds.com.

Publisher Name: Business Wire
Company Names: *Pilgrim Prime Rate Trust
Industry Names: BUS (Business, General); BUSN (Any type of business)
Special Features: COMPANY

66/9/22 (Item 22 from file: 610)
00660832 20020207038B8921
Phoenix Reports Fourth Quarter and Full-Year 2001 Results

Business Wire
Thursday , February 7, 2002 07:07 EST
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Text:

HARTFORD, Conn., Feb 7, 2002 (BUSINESS WIRE)
- Note: Fourth quarter results
are compared with the third quarter of 2001 rather than the fourth quarter of
2000 because of Phoenix's June 2001 demutualization and its January 2001 purchase of the 40 percent of Phoenix Investment Partners (PXP) it did not already own. These transactions make certain quarterly year-over-year comparisons less meaningful.

-- Significant earnings improvement compared with the third quarter

-- Strong life and annuity sales momentum

-- Investment management assets under management up 6.7 percent in fourth quarter as markets recovered

-- On track to realize annualized expense savings in excess of $25 million by
year-end 2002

The Phoenix Companies, Inc. (NYSE: PNX) today reported significantly improved
results for the fourth quarter of 2001 compared with the third quarter of 2001. In addition to net income in accordance with Generally Accepted Accounting Principles (GAAP), the company considers operating income and cash
operating income excluding venture capital in evaluating its financial performance. (See attached table reconciling these measures.)

Operating income was $22.7 million, or $0.22 per **share**, in the fourth quarter
of 2001, compared with a loss of $27.4 million, or $0.26 per **share**, in the
third quarter of 2001. Operating income represents net income adjusted for realized investment **gains** and losses and non-recurring items. Non-recurring
items include expenses related to Phoenix's demutualization and its acquisition of the PXP minority interest, an early retirement program, surplus
taxes, a one-time adjustment for deferred acquisition costs and the cumulative
effect of accounting changes.

Cash operating income excluding venture capital was $28.2 million, or $0.27 per **share**, in the fourth quarter of 2001, compared with $17.9 million, or
$0.17 per **share**, in the third quarter of 2001. The company adds back
amortization of goodwill and other intangibles to operating income to measure
the ability of the business to generate cash earnings. In addition, the company excludes the Venture Capital segment to measure the performance of its

core operating businesses. Venture Capital is a separate reporting segment in
order to provide greater transparency when evaluating operating performance.

The company reported a GAAP net loss of $7.5 million, or $0.07 per **share**, in
the fourth quarter of 2001, compared with a net loss of $21.2 million, or $0.20 per **share**, in the third quarter of 2001. Net investment losses, which
totaled $35.2 million in the fourth quarter of 2001, were primarily attributable to the impairment of Enron and related entities, Argentine issuers, Global Crossing Ltd. and several collateralized debt obligations.

For full-year 2001, Phoenix reported an operating loss of $74.1 million, or $0.71 per **share**, compared with operating income of $206.2 million in 2000, due
primarily to losses on venture capital partnership investments. The company reported a full-year 2001 GAAP net loss of $202.7 million, or $1.94 per **share**,
compared with GAAP net income of $83.3 million in 2000.

"In 2001 we made a highly successful transition from a mutual to a public company in the midst of a very turbulent market and a challenging economic environment," said Robert W. Fiondella, chairman and chief executive officer.
"We remain focused on achieving an 8 to 10 percent cash return on equity, excluding venture capital, by the end of 2003." He cited progress on the following previously announced initiatives:

-- Realization of $6 million in expense savings in 2001 toward the company's
stated goal of more than $25 million of annualized savings by the end of 2002;

-- Acquisition of two investment management firms, Capital West Asset Management, LLC, which closed on November 14, 2001, and Kayne Anderson Rudnick
Investment Management, LLC, which closed on January 29, 2002;
-- Completion of a $300 million retail debt offering in December;

-- Purchase of 5.3 million **shares** as of February 6, 2002 through the company's
first stock repurchase program; and,

-- Continued analysis of closed block reinsurance to release capital and increase profitability, and of alternative approaches to venture capital investments.

Segment Results

Phoenix has two operating segments, Life and Annuity and Investment Management, and two reporting segments, Venture Capital and Corporate and Other. The Corporate and Other segment includes unallocated capital and expenses, as well as certain businesses not of sufficient scale to report independently. The company looks at its segment results on the basis of operating income (loss) before amortization, interest and tax to focus on the
earnings ability of each segment as follows:

Third Quarter	Fourth Quarter	For the Year Ended December 31,

	2001	2001	2000	2001
		(in millions)		
Life and Annuity	$ 11.6	$ 24.7	$ 30.2	$ 83.5
Investment Management	11.3	12.5	71.1	53.3
Venture Capital	(48.4)	15.6	277.3	(159.6)
Corporate and Other	4.9	5.1	(31.6)	(12.3)

Life and Annuity - Operating income before amortization, interest and tax in the fourth quarter of 2001 was $24.7 million, compared with $11.6 million in the third quarter of 2001. The increase can be attributed to higher fund balances as a result of strong sales and favorable mortality margins. Operating income before amortization, interest and tax for full-year 2001 was $83.5 million, compared with $30.2 million for full-year 2000, reflecting stronger earnings in variable universal life insurance, annuities and the closed block. It also includes the recognition of $15.8 million in the second quarter of 2001 related to favorable experience in the closed block, pursuant to the adoption of new accounting guidance for demutualized companies (SOP-00-3).

Positive sales momentum continued in this segment, despite the company's shift away from participating insurance after its demutualization, turbulent markets and the uncertainty caused by estate tax reform.

Total life insurance sales (annualized premium and single premium) were $58.3 million in the fourth quarter of 2001, a 12 percent rise from $52.0 million in the third quarter of 2001. Survivorship sales rebounded in the fourth quarter, representing a third of total sales, a similar proportion as in the prior year's fourth quarter. Full-year 2001 total life insurance sales were $222.4 million, up 15 percent from 2000. Variable universal life sales grew 20 percent in 2001 to $169.9 million from $141.0 million in 2000, and universal life sales in 2001 nearly tripled to $29.0 million from $9.8 million in 2000.

Annuity deposits in the fourth quarter of 2001 were up two and a half times at $593.4 million, compared with $235.5 million in deposits in the third quarter of 2001. Deposits for full-year 2001 more than doubled to $1.5 billion over full-year 2000 deposits of $687.0 million. These strong sales reflect a sharp rise in production through several new distribution relationships, evidence of a return on earlier investments in building the annuity business and expanding the company's wholesaling network.

Investment Management - Operating income before amortization, interest and tax was $12.5 million for the fourth quarter of 2001, compared with $11.3 million

in the third quarter of 2001, principally reflecting stronger than expected results from Aberdeen Asset Management, in which the company has an equity ownership interest. For full-year 2001, operating income before amortization, interest and tax was $53.3 million, compared with $71.1 million for full-year 2000. While the segment experienced positive net sales for the year, declines in the markets caused lower assets under management and correspondingly lower asset management fees.
Assets under management for the segment on December 31, 2001 were $52.1 billion, a 6.7 percent increase over $48.8 billion on September 30, 2001. Assets under management on December 31, 2000 were $56.6 billion.

Net redemptions in the fourth quarter of 2001 were $593.5 million, compared with net redemptions of $363.8 million in the third quarter of 2001. Full-year 2001 net sales were $459.0 million, a significant improvement over net redemptions of $957.0 million for full-year 2000.

Deposits totaled $1.8 billion in the fourth quarter of 2001, compared with $2.1 billion in the third quarter of 2001, reflecting declines in sales of mutual funds and managed accounts. Full-year 2001 deposits were $9.5 billion, compared with $11.5 billion for full-year 2000. Fourth quarter 2001 redemptions in mutual funds and managed accounts improved from the third quarter of 2001, the second consecutive quarter for mutual funds and the third consecutive quarter for managed accounts. Overall redemptions remained essentially flat at $2.4 billion in the fourth quarter of 2001, compared with $2.5 billion in the third quarter of 2001. Overall redemptions for full-year 2001 improved significantly over 2000, at $9.1 billion, compared with $12.5 billion.

The company continued to invest in its managed account business with the acquisitions of Capital West Asset Management, LLC, which closed on November 14, 2001, and Kayne Anderson Rudnick Investment Management, LLC, which closed on January 29, 2002. These acquisitions increase the company's sponsored managed account assets by almost 75 percent. Pro-forma total assets under management including Kayne Anderson were $59.6 billion as of December 31, 2001.

Venture Capital - Operating income before amortization, interest and tax from venture capital partnerships in the fourth quarter of 2001 was $15.6 million, compared with a loss of $48.4 million in the third quarter of 2001, reflecting market improvements during the quarter. For full-year 2001, venture capital partnerships results declined largely in concert with their sectors in the equity markets. The segment posted an operating loss before amortization, interest and tax of $159.6 million for full-year 2001, compared with income of $277.3 million for full-year 2000.
Total distributions by partnerships in the fourth quarter of 2001 were $17.3 million, compared with $7.7 million in the third quarter of 2001. Capital

contributions to partnerships were $11.7 million in the fourth quarter of 2001, compared with $11.2 million in the previous quarter. In the first quarter of 2001, the company changed its method of accounting to eliminate the
lag in reporting partnership results. At the end of 2001, venture capital assets were $291.7 million, representing 2 percent of the $14.4 billion of invested assets, compared with $467.3 million, representing 4 percent of the
$12.8 billion portfolio at the end of 2000.

During the fourth quarter, the company continued to explore alternative approaches to venture capital investments to stabilize results and reduce risks while allowing the company to participate in and benefit from this asset
class.

Corporate and Other -Operating income before amortization, interest and tax was $5.1 million in the fourth quarter of 2001, compared with $4.9 million in
the third quarter of 2001. For full-year 2001, this segment experienced an operating loss before amortization, interest and tax of $12.3 million, compared with a loss of $31.6 million for full-year 2000. The improvement from
2000 reflects lower corporate expenses.

The Phoenix Companies, Inc. (NYSE: PNX) is a leading provider of wealth management products and services to individuals and institutions. Through a variety of advisors and financial services firms, Phoenix helps the affluent
and high net worth accumulate, preserve and transfer their wealth with an innovative portfolio of life insurance, annuity and investment management products and services. With a history dating to 1851, The Phoenix Companies,
Inc. has two principal operating subsidiaries, Phoenix Life Insurance Company
and Phoenix Investment Partners, Ltd., and offers trust services through another subsidiary, Phoenix National Trust Company. Phoenix has corporate offices in Hartford, Conn. For more information on Phoenix, visit www.phoenixwm.com.

Note: The Phoenix Companies, Inc. will host a conference call today at 11:00
a.m. Eastern Standard Time to discuss with the investment community Phoenix's
fourth quarter and full-year financial results. The conference call will be broadcast live over the Internet at www.phoenixwm.com in the Investor Relations section. To listen to the live call, please go to the Web site at least fifteen minutes prior to register, download and install any necessary audio software. The call can also be accessed by telephone at 1-973-321-1020.
A replay of the call will be available by telephone at 1-973-341-3080 (passcode 3051577) and on Phoenix's Web site, www.phoenixwm.com in the Investor Relations section through February 14, 2002.

This release contains statements which constitute forward-looking statements
within the meaning of the Private Securities Litigation Reform Act of 1995. These include statements relating to trends in, or representing management's
beliefs about, the company's future strategies, operations and financial results, as well as other statements including words such as "anticipate", "believe," "plan," "estimate," "expect," "intend," "may," "should" and

other
similar expressions. Forward-looking statements are made based upon management's current expectations and beliefs concerning trends and future their potential effects on the company. They are not guarantees of future performance. Actual results may differ materially from those suggested by forward-looking statements, as a result of risks and uncertainties which include, among others: (i) changes in general economic conditions, including changes in interest rates and the performance of financial markets; (ii) heightened competition, including with respect to pricing, entry of new competitors and the development of new products and services by new and existing competitors; (iii) the company's primary reliance, as a holding company, on dividends from its subsidiaries to meet debt payment obligations and the applicable regulatory restrictions on the ability of the subsidiaries to pay such dividends; (iv) regulatory, accounting or tax changes that may affect the cost of, or demand for, the products or services of the company's subsidiaries; (v) downgrades in the claims paying ability or financial strength ratings of the company's subsidiaries; (vi) discrepancies between actual claims experience and assumptions used in setting prices for the products of the company's insurance subsidiaries and establishing the liabilities of such subsidiaries for future policy benefits and claims relating to such products; (vii) movements in the equity markets that affect our investment results including those from venture capital, the fees we earn from assets under management and the demand for our variable products; (viii) the company's success in achieving its planned expense reductions; and (ix) other risks and uncertainties described from time to time in the company's filings with the Securities and Exchange Commission. The company specifically disclaims any obligation to update or revise any forward-looking statement, whether as a result of new information, future developments or otherwise.

Financial Highlights (Unaudited)

Income Statement Summary ($ in millions)	Third Quarter 2001	Fourth Quarter 2001	Year Ended December 31, 2000	2001
Revenues	607.6	626.1	2,997.2	2,421.8
Operating (Loss) Income from Continuing Operations, After Tax (1)	(27.4)	22.7	206.2	(74.1)
Add: Amortization of Goodwill and Intangibles	13.9	15.6	24.2	57.0
Cash Operating Income from Continuing Operations, After Tax	(13.5)	38.3	230.4	(17.1)
Cash Operating Income, excluding Venture Capital, After				

Tax	17.9	28.2	50.2	86.6
GAAP Reported:				
Net (Loss) Income	(21.2)	(7.5)	83.3	(202.7)

Earnings Per **Share** (2)	Third Quarter 2001	Fourth Quarter 2001	Year Ended December 31, 2000 (pro forma)	2001
Operating EPS	$ (0.26)	$ 0.22	$ 1.97	$ (0.71)
Cash Operating EPS	$ (0.13)	$ 0.37	$ 2.20	$ (0.16)
Cash Operating EPS, excluding Venture Capital	$ 0.17	$ 0.27	$ 0.48	$ 0.83
Net (Loss) Income Per **Share**	$ (0.20)	$ (0.07)	$ 0.80	$ (1.94)

Balance Sheet Summary ($ in billions)	Third Quarter 2001	Fourth Quarter 2001	Year Ended December 31, 2000	2001
Invested Assets	13.7	14.4	12.8	14.4
Separate Account Assets and Investment Trusts	4.6	5.6	5.4	5.6
Total Assets	20.8	22.5	20.3	22.5
Total Equity	2.4	2.4	1.8	2.4
Book Value Per **Share**	$ 22.89 (3)	$ 23.51 (3)	$ 24.75 (4)	$ 23.51 (3)
Assets Under Management	57.4	61.1	64.5	61.1

(1) Operating income represents net income adjusted for realized **gains** and some non-recurring items because they are not indicative of the ongoing operations of the business segments. The size and timing of realized **investment gains** are often subject to management's **discretion**. Certain non-recurring items are removed from net income if, in management's opinion, they are not indicative of overall operating trends. While some of these items may be significant components of our net income, we believe operating income is an appropriate measure that represents the net income attributable to the ongoing operations of the business. However, operating income is not a substitute for net income determined in accordance with generally accepted accounting principles, and may be different from similarly titled measures of other companies.

(2) Based on 103.3 million weighted-average **shares** outstanding for the fourth quarter of 2001, 105.3 million weighted-average **shares** outstanding for the third quarter of 2001, and 104.6 million weighted-average **shares** outstanding for the years ended 2000 and 2001.

(3) Based on 101.9 million and 103.4 million **shares** outstanding as of December 31, 2001 and September 30, 2001, respectively.

(4) Pro forma based on 105 million **shares** outstanding at

December 31,
2000.
Condensed Consolidated Balance Sheets

	As of December 31,			
	2000	2001		
Assets:	(in millions, except **share** data)			
Investments				
Held-to-maturity debt securities, at amortized cost remiums	$ 302.7	$ 276.7	$ 1,147.4	$ 1,112.7
Insurance and investment product fees	129.1	132.1	631.0	546.4
Net investment income	192.5	252.5	1,129.6	835.1
Net realized investment (losses) **gains**	(16.7)	(35.2)	89.2	(72.4)
Total revenues	607.6	626.1	2,997.2	2,421.8
Benefits and expenses:				
Policy benefits and increase in policy liabilities	390.4	350.0	1,409.8	1,406.7
Policyholder dividends	105.7	98.4	378.0	400.1
Amortization of deferred policy acquisition costs	33.3	37.7	356.0	133.0
Amortization of goodwill and other intangible assets	12.7	12.1	36.9	49.4
Interest expense	6.4	6.1	32.7	27.3
Demutualization expenses	5.3	1.1	21. 8	25.9
Other operating expenses	118.8	131.8	604.5	628.1
Total benefits and expenses	672.6	637.2	2,839.7	2,670.5
(Loss) income from continuing operations before income taxes, minority interest and equity in earnings of and interest earned from investments in unconsolidated subsidiaries	(65.0)	(11.1)	157.5	(248.7)
Income tax (benefit) expense	(43.2)	(3.6)	56.2	(110.5)
(Loss) income from continuing operations before minority interest and equity in earnings of and interest earned from investments in				

unconsolidated subsidiaries	(21.8)	(7.5)	101.3	(138.2)
Minority interest in net income of consolidated subsidiaries	(1.6)	(2.1)	(14.1)	(7.2)
Equity in earnings of and interest earned from investments in unconsolidated subsidiaries	2.2	2.1	7.6	8.1
(Loss) income from continuing operations	(21.2)	(7.5)	94.8	(137.3)
Discontinued operations:				
Income from discontinued operations, net of income taxes	--	--	9.4	--
Loss on disposal, net of income taxes	--	--	(20.9)	--
(Loss) income before cumulative effect of accounting changes	(21.2)	(7.5)	83.3	(137.3)
Cumulative effect of accounting changes for:				
Venture capital partnerships, net of income taxes	--	--	--	(48.8)
Securitized financial instruments, net of income taxes	--	--	--	(20.5)
Derivative financial instruments, net of income taxes	--	--	--	3.9
Net (loss) income	$ (21.2)	$ (7.5)	$ 83.3	$ (202.7)

Reconciliation of Income Measures

	Third Quarter 2001	Fourth Quarter 2001	Year Ended December 31, 2000	2001
	(in millions)			
GAAP Reported: Net (Loss) Income	$ (21.2)	$ (7.5)	$ 83.3	$ (202.7)
Less: Net Realized Investment (Losses) **Gains**, After Tax	(10.6)	(22.1)	55.0	(46.1)
Less: Non-Recurring Items, After Tax:				
Deferred Policy Acquisition Costs Adjustment	--	--	(141.8)	--
Expenses of Purchase of				

PXP Minority Interest	(3.2)	(2.9)	(0.7)	(52.8)
Early Retirement Pension Adjustment	--	(4.2)	--	(15.5)
Demutualization Expense	(3.9)	(1.0)	(14.1)	(23.9)
Surplus Tax	21.0	--	(10.4)	21.0
Other	2.9	--	0.6	5.3
Non-Recurring Items, After Tax	16.8	(8.1)	(166.4)	(65.9)
Less: Discontinued Operations	--	--	(11.5)	--
Less: Cumulative Effect of Accounting Changes	--	--	--	(16.6)(A)
Operating (Loss) Income from Continuing Operations, After Tax	(27.4)	22.7	206.2	(74.1)(B)
Less: Venture Capital After-Tax	(31.4)	10.1	180.2	(103.7)
Add: Amortization of Goodwill and Intangibles	13.9	15.6	24.2	57.0
Cash Operating Income, Excluding Venture Capital, After Tax	$ 17.9	$ 28.2	$ 50.2	$ 86.6

(A) Excludes the cumulative effect of accounting change for venture capital partnerships. See (B) below.

(B) Includes cumulative effect of accounting change for venture capital partnerships of $75 million (pre-tax), which was recorded in the first quarter of 2001, as management considers this when evaluating the financial performance of the venture capital reporting segment.

Note: For additional information see our financial supplement.

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URL: http://www.businesswire.com

Company Names: phoenix investment partners, ltd.

Product Names: COMPANY PROFILES; CORPORATE; CORPORATE FINANCIAL DATA; CORPORATE PERFORMANCE; FINANCIAL SERVICES; INSURANCE; INVESTMENT; LIFE INSURANCE; MERGERS AND ACQUISITIONS

Event Names: COMPANY PROFILES; CORPORATE FINANCIAL DATA; CORPORATE FUNDING; CORPORATE GROUPS AND OWNERSHIP; CORPORATE PERFORMANCE; INVESTMENT; JOINT VENTURES; MERGERS AND ACQUISITIONS; STOCKS AND SHARES

66/9/23 (Item 23 from file: 15)
02338633 112327573
Rethinking securities markets: The SEC Advisory Committee on market information and the future of the National Market System

Seligman, Joel
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Abstract:

Since 1975, the markets have undergone a transformation made possible through the advancement of new technology. In particular, although the NYSE remains the dominant national securities exchange, the development and increasing prominence of electronic communications networks and the declining role of competitive security quotes raise questions as to the continuing appropriateness of the old framework for disseminating market information. This article reviews the findings of the SEC Advisory Committee on Market Information, released September 2001, identifying 6 principal conclusions.

Text:

In September 2001, the Securities and Exchange Commission (SEC or the "Commission") Advisory Committee on Market Information delivered its report, A Blueprint for Responsible Change, to the Commission.I This Report was completed before the terrible national tragedy of September 11 and does not, indeed could not, take into account the implications of those horrific events in its discussion and recommendations.

Most significantly, the Report concluded:

* Price transparency2 and consolidated market information are and should continue to be core elements of U.S. securities markets.'

* A substantial majority of the Advisory Committee favored the retention of the "Display Rule" 1 lAc 1-2, which requires vendors and broker-dealers to provide a consolidated display of last sale transaction reports and quotations from all reporting stock market centers.4 Specifically, the Display Rule requires each vendor or broker-dealer which provides quote information for any stock that is traded on a national securities exchange or Nasdaq5 to provide either the national best bid or offer (NBBO) for the stock or a quotation montage for the stock from all reporting market centers.6

* Market centers should be permitted to distribute additional market information such as limit order books free from mandatory consolidation requirements.7 This would permit information to be customized for users or not distributed at all.

* A majority of the Advisory Committee recommended that the Commission

should permit a new system competing consolidations model to evolve from the current unitary consolidator model under which a single consolidation such as the Consolidated Tape Association receives and disseminates market information from all reporting market centers and distributes this information to vendors and subscribers. Under this proposal each market center, such as New York Stock Exchange (NYSE), would be permitted to sell its market information to any number of competing consolidators, which, in turn, would sell to vendors and subscribers.,

* A minority of the Advisory Committee did not believe that the economic benefits of implementing a new model outweigh the technological and economic risks of the new competing consolidator model.9

* The Advisory Committee generally agreed that if the Commission chooses not to adopt the competing consolidator model, it should adopt specific improvements to the existing model, including selecting the information processor by competitive bidding and broadening governance through a non-voting advisory committee.10
*The Advisory Committee expressly rejected a proposal in an SEC December 1999 Concept Release for SEC review of market information fees under a cost-based standard somewhat similar to a utility commission review of rates.11

*The Advisory Committee recommended that the Commission continue review of relevant plans and fees under existing standards. 12

*With respect to options, the conclusions of the Advisory Committee were more tentative. At the time of the Committee's meetings, the capacity challenges for options market data were more daunting than for equities.

*A majority of the Advisory Committee supported the development of a consolidated NBBO for all options exchanges and permission for competing consolidators to evolve. The discussion of competing options data consolidators recognized that it might be more difficult for the options exchanges to satisfy the Commission that the technological requirements of a new competitive consolidator model could be effectively addressed before this had been demonstrated in the equity markets. 13

The Advisory Committee Report is most significant in its recommendation of a new competitive structure for market information consolidation and a less regulatory approach to this aspect of the national market system. The first portion of this Article outlines this potential evolution of the national market system."

The Advisory Committee itself was limited in its scope and its ability to engage in fact finding. Its purpose was to build consensus for recommendations to the SEC concerning market data regulation after earlier Commission efforts had resulted in substantial divergence of opinion. The experience of the Advisory Committee has again suggested to me the need for a comprehensive study of securities markets to provide an informed basis for the SEC and Congress in what is likely to be a period of extraordinary change in the securities markets. 15 The second portion of this article describes the potential scope of such a study. 16

To a large extent, each of the Advisory Committee's recommendations is a reflection of new possibilities created by the changes that have occurred in information technology since 1975, when the statutory basis for the current market was enacted. Technological change has already led to major changes in the securities markets, including decimalization, the development of electronic communication networks and alternative trading systems, global competition among exchanges, and faster trading cycles.

Technology is changing our securities markets so rapidly today that it would be wise for a more comprehensive study of securities market structure issues to be initiated. It is less important whether this study be conducted by the SEC Division of Market Regulation, a quasi-independent Special Study, or a staff study supervised by an SEC Commissioner. Each model has worked effectively in the Commission's history. What is important, however, is that there be an informed basis for SEC and congressional decisions with respect to significant securities market structure issues. The rate of technological change has so accelerated in securities markets in recent years that such a study would now be prudent.

THE STRUCTURE OF THE NATIONAL MARKET SYSTEM

At least since 1936, the basic policy of the SEC with respect to the market structure of stock trading on national securities exchanges has been to favor "unlisted" or "multiple" trading of the NYSE list on regional exchanges. 17 Underlying this policy are three pivotal assumptions: (i) The NYSE dominates stock trading on the national securities exchanges, as distinct from the over-the-counter market. This has continued to be true. As of 1998, the NYSE was responsible for eightyeight percent of the dollar value of stock trades on national securities exchanges and eighty-seven percent of the **shares** traded."' (ii) The principal competition limiting the market power of the NYSE comes from the "regional" exchanges (essentially, the Boston, Chicago, Cincinnati, Pacific, and Philadelphia stock exchanges) which in 1998 generated slightly under ten percent of **share** volume in the NYSE list." (iii) The principal basis of stock exchange competition was through competitive quotes. This time-honored policy has been responsible for Congressional and Commission policy favoring unlisted trading under which securities listed on the NYSE can be competitively traded on rival regional exchanges."

This is also a policy which today is question begging in two of its three basic assumptions. While the NYSE does endure as the dominant national securities exchange, competition to the NYSE is increasingly more likely to come from electronic communications networks (ECNs) and potentially the Nasdaq, rather than the regional stock exchanges. Recent competition to the NYSE has come increasingly from payment for order flow or internationalization of order flow opportunities rather than from competitive security quotes. The SEC time honored market structure policy is now overdue for serious reexamination.

THE FRAMEWORK FOR DISSEMINATING MARKET INFORMATION

Underlying the current statutory structure of the National Securities Market System are the Securities Act Amendments of 19 75. 11 In section I IA(a) (1) of the Securities Exchange Act, Congress found, in relevant part:

(B) New data processing and communications techniques create the opportunity for more efficient and effective market operations.

(C) It is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure
(i) economically efficient execution of securities transactions;

(ii) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;

(iii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities;

(iv) the practicability of brokers executing investors' orders in the best market; and

(v) an opportunity, consistent with the provisions of clauses (i) and (iv) of this subparagraph, for investors' orders to be executed without the participation of a dealer.

(D) The linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors' orders, and contribute to best execution of such orders.22

The SEC's efforts to facilitate creation of a national market system focused initially on implementation of a system-wide communications network. Before the SEC's effort to create a consolidated transaction reporting system, the primary transaction (or last sale price) reporting of exchange listed securities was provided by NYSE and Amex ticker tapes and electronic displays, which gave a continuous report of transactions executed on the floors of the two New York City exchanges.21 Trading in NYSE listed securities executed on regional exchanges or executed by over-the-counter market makers who were not exchange members (popularly called "third market makers") was not reported on the NYSE tape.21 The SEC's attempt to create a consolidated transaction tape essentially was a proposal to increase the visibility of regional exchange specialists and third market dealers who made markets in NYSE listed securities by including reports of their transactions on the same tape that reported transactions executed on the NYSE.

This was initially accomplished by the SEC in 1972 with its adoption of Rule 17a-15, redesignated Rule 11Aa3-1 in 1980.25 Under Rule 11Aa3-1 and Consolidated Tape Association (CTA) plans filed under that Rule,26 the Securities Industry Automation Corporation (SIAC), a jointly owned subsidiary of the NYSE and Amex, became the central processor for last sale and quote information from the reporting stock exchanges.27

The most significant component of a consolidated reporting system is the consolidated quotation system. "[S]uch a system," wrote the SEC's Advisory Committee on Market Disclosure in November 1972 is "the cornerstone on which a central market system will be built. 1128 Unlike the consolidated last sale reporting tape, the consolidated quotation system provided the basis for a significant potential diversion of securities trading from the NYSE and Amex to the regional exchanges and the third market. The SEC's 1973 Policy Statement on the Structure of a Central Market System explained:

The progress we anticipate towards implementation of composite ... quotations systems should serve not only to facilitate but in most cases to require that a broker execute an order wherever the best price is obtainable. For one thing, a broker will be able to check all the quotations of all market makers and specialists in a particular security promptly and simultaneously ... Thus it appears that within the near future brokers will be able, in many cases for the first time, to look beyond their own market centers to satisfy their basic agency [that is, best execution] duty to their customers.29

After amendment, Rule 11 lAc-1 generally requires all exchanges and Nasdaq to collect from members and disseminate to information vendors a "firm" bid and offer and to designate quotation size (for example, 100 **shares**, 200 **shares**) for each security in which they make a market. A firm quotation is one in which the market maker is obligated to execute buy and sell orders up to a designated "size" limitation. There were certain exceptions to the firm quote rule, such as for unusual market conditions.10 The SEC's perception of its new rule was

clear. "Thus, stated the Commission, for the first time, relatively reliable and comprehensive information as to prices and sizes of quotations for all reported securities from all markets, whether on exchanges or over-the-counter will be made available to market professionals and the public."31

Rule 11 lAcl-2 ("The Display Rule") similarly addresses vendor display of last sale reports and quotations.32

By the time of the Advisory Committee, the stock and options markets (selfregulatory organizations or SROs) under this framework had acted jointly to develop plans for the consolidated collection and dissemination of market information. These plans require each national securities exchange or securities association to transmit market information to a central processor that consolidates the information into a single data stream to disseminate to specified vendors and end users. The vendors further distribute the data to end users. The plans are comprehensive in nature addressing plan governance, data fees, and revenue distribution to plan participants.

By 2001, there were four market information networks: (i) the Consolidated Tape Association (CTA) and Consolidated Quote Plan (CQ) Network A which consolidated market information for securities listed on the NYSE and multiply listed on regional exchanges; (ii) CTA-CQ Network B for securities listed on the American Stock Exchange or the regional exchanges; (iii) the Nasdaq system for securities listed on the Nasdaq; and (iv) the Options Pricing Reporting Authority (OPRA) for options listed on the options exchanges.

While there were differences among the networks, their operation at the time of the Advisory Committee was usefully summarized with respect to Network A:

Network A is operated under the CTA Plan, which governs the collection and distribution of transaction information, and the Consolidated Quotation Plan ("CQ Plan"), which governs the collection and distribution of quotation information. Network A disseminates market information for any common stock, long-term warrant, or preferred stock listed on the NYSE. There are approximately 3,550 securities reported on Network A.

The nine SRO participants in the CTA Plan and CQ Plan are the Amex, Boston Stock Exchange ("BSE"), [Chicago Board Options Exchange] CBOE, Chicago Stock Exchange ("CHX"), Cincinnati Stock Exchange ("CSE"), NASD, NYSE, [Pacific Exchange] PCX, and [Philadelphia Stock Exchange] Phlx....

The CTA is an association of SRO participants in the CTA Plan, each of which names one representative to the CTA committee. The CTA administers the CTA Plan and is registered as a securities information processor ("SIP") under Section 1 1A(b) of the Exchange Act. The CQ Plan is administered by an Operating Committee that is substantially the same as the CTA. Under delegated authority, the administrator of Network A's day-to-day operations is the NYSE.... The Securities Industry Automation Corporation ("SIAC"), also a registered SIP under Exchange Act Section 1 IA(b), acts as Network A's information processor.33

There are certain significant differences with respect to the Nasdaq 34 or OPRA 35 networks; and there were and are significant similarities among the Networks.

Each plan was governed by an Operating Committee composed of one representative from each SRO participant. This means that vendors and subscribers were not directly involved in governance.36

Each plan is administered on a day-to-day basis by a network administrator, who contracts with vendors and users, called subscribers in the plans, for access to network data.37 Plan administration has been criticized for its slowness and alleged arbitrariness, most typically by vendors and subscribers.38

Each plan requires SRO participants to collect from their members and promptly report market data to plan processors.39 Notably, in addition to the information required to be collected and consolidated under the plans, the SROs are permitted to separately disseminate additional market information. In the near future, for example, the New York Stock Exchange has announced that it plans to begin publicly disseminating its specialist limit order book outside the CTA and CQ plans.40

The SROs, through the relevant plans, jointly set fees for access to market information. The SROs also jointly determine the way market data revenues are allocated among the SRO participants in the plans.4" The SEC reviews market information fees as amendments to the CTA, CQ, and OPRA plans under Rule 1 lAa32(c) of the Securities Exchange Act and proposed rule changes by the NASD under section 19(b).42 Commission review has largely deferred to the SRO participants.43

In 2000, total market information fees charged under the plans provided revenues of $469 million, roughly twenty percent of all SRO revenue.44 After dividing operating expenses, each Network's revenues generally are distributed to its participants in proportion to their **share** of total transaction volume in the Network.45

CHALLENGES TO THE MARKET INFORMATION MODEL

Not surprisingly, this magnitude of market information revenue was susceptible to challenge, particularly when the relevant plans only included SRO participants and did not include vendors and broker-dealers. In June 1999, Charles Schwab & Co. submitted a petition to the SEC requesting a proceeding to govern access to market data. The Schwab petition argued that existing market information fee levels were not fair, reasonable, or nondiscriminatory as required by the Securities Exchange Act.46

There were broader bases for a re-examination of the Commission Market Information Model.

In early 2001, stocks began trading in decimals, meaning penny increments, for the first time.47 The move from quoting in one-eighth increments (or 12.5 cents) to pennies means that the value of the NBBO might be reduced and the value of the "book" of limit orders to be executed at lower or higher prices takes on greater significance.

A significant increase in competition with the traditional stock exchanges and the Nasdaq has come from ECNs, which, in some instances can be viewed as new electronic securities exchanges or quasi-securities exchanges. When the Advisory Committee began, ECNs, unless registered as national securities exchanges, were required to consolidate their quote and last sale reports into stock exchange or Nasdaq consolidated data. As the Advisory Committee report recognized, "[s] ome ECNs, which are operated by for-**profit** entities, have applied for registration or indicated an interest in registering as national securities exchanges. ECNs also have sought to have their quote and trade information widely publicized, including as part of the consolidated quote."48 A for-**profit** exchange might view market data revenues as a means to increase profitability which could raise new SEC responsibilities for fee review.

This was one of several factors prompting the Nasdaq stock market to take steps to convert to being a for-**profit** corporation.49

At roughly the same time, retail securities trading was being significantly changed by Internet or online trading. Internet based trading systems were first introduced in 1995. By the first quarter of 2001, there were over 20 million online accounts and an average of approximately 853,000 trades per day. "Broad access to real-time market information is critical to retail investors' ability to monitor and control their own securities transactions, including the quality of execution of their transactions by broker-dealers."50

In December 1999, the Commission issued a Concept Release on the regulation of market information, which focused in detail on a proposal for a flexible costbased (or public utility) type of SEC market data fee regulation." The Release also addressed a variety of other market information issues including plan governance and public disclosure concerning fees and revenues. The forty or so comments 52 that the Commission received in response to the Concept Release reflected deep divisions in the securities industry on market information regulation. While most comments were skeptical of the detailed SEC-proposed approach for a cost-based limit on market information fees,53 there was sharp division on the fairness and reasonableness of existing fee levels.54 There was related division as to whether it was appropriate for market information fees to provide funding for other SRO functions such as market regulation.55 Views were also disparate on how much greater SRO and plan disclosure should be about market information;56 new concepts of Plan governance (notably, whether vendors and subscribers could be members of Plan Operating committees);57 whether plan administration should be standardized;511 and whether the duration of pilot programs should be limited. 19

What were particularly significant in the comments to the Concept Release were proposals that more competition be introduced to the compilation and dissemination of market data. Most significantly, the NYSE urged that participants should be allowed to withdraw from the CTA and CQ plans.bo

In the summer of 2000, SEC Chair Arthur Levitt asked me to chair a twentyfive-member Advisory Committee whose members represented a broad range of relevant economic interests concerning market information, including exchanges, ECNs, broker-dealers, retail and institutional investors, data vendors, and public representatives.61 Under its charter the Advisory Committee was asked to address:

(i) the value of transparency to the markets;
(ii) the impact of decimalization and electronic quote generation on market transparency;

(iii) the merits of consolidated market information;

(iv) alternative models for collecting and distributing market information;

(v) how market data fees should be determined and evaluated; and

(vi) practical matters relating to the joint market information plans, such as appropriate governance structures and issues relating to plan administration and oversight.62

PRINCIPAL CONCLUSIONS OF THE ADVISORY COMMITTEE

The Advisory Committee Report reached six principal conclusions.

Data Ownership Was Unaddressed

Who owns market information? As a matter of law, ownership of such intellectual property requiring so many interrelated parties to assemble it is a fascinating question. It was not one the Advisory Committee addressed. The reason for this apparent analytical gap is worth stressing. In the 1975 Securities Acts Amendments, Congress granted the Commission "pervasive" authority to regulate market information, regardless of who owned the data.[63] Unless the Committee was prepared to recommend that all SEC regulation of market data end, which it largely was not, there was no need to address market data ownership. In this context, questions of ownership are in fact questions of SEC power to regulate. The efforts of the Advisory Committee addressed the wisest approach to Commission regulation.

There are enduring questions here worthy of serious academic study. The question of who owns market data is also a question of how best to stimulate innovation. Too rapid or political a conclusion that a new set of actors owns data runs the risk of stultifying new data product generation and generating the type of litigation that often paralyzes other forms of new intellectual property for sustained periods. Nonetheless, this type of study would be wise.

Price Transparency Is a Core Element of United States Equity and Options Markets

There was general agreement that "[p]rice transparency is essential for efficient price discovery and the best execution of customer orders."[64] At one level this was a theory to which all or virtually all of the Advisory Committee could subscribe: More information is generally better. Nonetheless, this broad agreement masked fundamentally different approaches to the dissemination of market information.
From the point of view of some broker-dealers and others, transparency was essential for broker-dealers to fulfill their fiduciary duty of best execution of customer orders.[65] Price transparency enables investors to have real time access to prices and quotes,[66] and consolidated market information countervails the possibility that the securities markets will fragment into separate unconnected markets with inferior prices to discover.[67] Information transparency also enhances investor protection by providing investors a means to monitor the quality of executions and may, in turn, inspire greater investor confidence in the securities markets.[611]

For the Advisory Committee the pivotal question was not whether there should be price transparency, but how best to ensure it. One of the inspirations for the Advisory Committee itself had been the recognition that decimalization might reduce the value of the NBBO (best bid-best offer quotation) approach to transparency and increase the significance of quotes above or below the current market, particularly for investors seeking to trade in large size.

On the other hand, increased mandatory display of data would impose costs and increase technological challenges. "[Q]uotes," as the Advisory Committee Report recognized "may change faster than the human eye can see."[69] There was also a general resistance to increasing government regulation, in part, because of uncertainty about how a broader mandate should be framed and in part because of a belief that market forces were likely to be more effective in producing the optimal mix of additional market information. The strong preference of the Advisory Committee was to recommend government intervention only when a strong case for such a mandate could be made and otherwise to rely on market forces.

Only Core Last Sale and NBBO Data Should Be Subject to SEC Mandate-All Other Data Dissemination Should Be Discretionary

The Commission adopted the Vendor Display Rule 11Ac1-2 in 1980 to facilitate intermarket price competition." Before then some information vendors only provided trade and quote information from the primary markets. The purpose of Rule 11 lAcl-2 was to ensure that consolidated data was provided and no market was favored in the vendor's display." This would provide a basis for markets to provide superior quotations to secure trades.

A substantial majority of the Advisory Committee favored retention of the Vendor Display Rule in the stock market.72 There were different grounds for this preference. For some proponents there endured the original concern that in the absence of an NBBO information from small or newer market centers would not be distributed. For others, the pivotal concern was investor protection. As the Advisory Committee Report generalized:

Several members of the Advisory Committee expressed concerns that, were the Display Rule to be eliminated, there would be no assurance that the information provided to investors, either directly or through their brokers, would contain the best quotes and trade prices from all public markets. While investors would likely continue to receive some market data, they would not necessarily be aware of which market's data was excluded from the stream they were viewing, or when a better price was available on another market....

Moreover, broker-dealers would have to obtain the full data stream on their own initiative, in order to assure best execution of customer orders. In the absence of consistent presentation of consolidated information to brokerdealers and investors, the Commission could be impelled to comprehensively inspect for, and enforce, the broker-dealer's duty of best execution, and to inspect for the misleading provision of limited market data. This would require an increased commitment of scarce Commission resources, and necessarily involve subjective determinations on the part of Commission staff. 73

There was a second broad Advisory Committee majority in favor of permitting the provision of all other noncore data (that is, data in addition to last sale reports and the NBBO), free from mandatory consolidation requirements. This would mean that non-SROs such as specialists, market makers, ECNs, and other brokerdealers could sell their core data independently so long as they provided the same core market data at the same time to the appropriate SRO.74 This would facilitate augmenting new consolidated data displays by information vendors.

Various Advisory Committee members proposed that vendors and others also should be required to contract for other types of data such as quote levels three or more levels below or above the NBBO; an aggregation of orders, say at 10,000 or 25,000 **share** levels; the high, low, and average price of a specified intraday period such as the past five minutes; and the full limit order book. The Advisory Committee recommendation supports permitting these and other new forms of data outside of a Commission mandate to any data recipient who is receiving consolidated data in compliance with the Vendor Display Rule 11Ac1-2.75 Over time it is possible that Commission confidence in market information data providers outside of the NBBO may encourage the SEC to reexamine whether a mandatory NBBO is necessary. At the least, the Advisory Committee's rigorous review of what is core information was intended to generally encourage a "free" market approach to market provision.

The Competing Consolidator Model

The most significant Advisory Committee conclusion was reached with respect to how mandatory market information should be consolidated. A majority of

the Advisory Committee endorsed the view that the Commission should permit the evolution of a competing consolidators model for processing and dissemination of equity market information rather than attempt to reform the current unitary model.76 A significant aspect of this conclusion was its conditional nature. The majority Advisory Committee conclusion was contingent on an SRO seeking to withdraw from an existing consortium or to initiate a new means of data processing satisfying specified technological and competitive criteria. These criteria were not intended to discourage or prevent new competition, but rather to ensure the smooth continued provision of mandatory consolidated data.

It is an often heard cliche that the devil is in the details. With electronic information, it is more apt to observe that the devil is in the architecture. The Advisory Committee Report summarized the background of this recommendation:

In May 1972, the NYSE and Amex proposed that the consolidated reporting system be implemented by the recently formed SIAC, which was jointly owned by the two exchanges. A few months later, the Advisory Committee on Market Disclosure made specific recommendations for a mechanism for consolidating market information. It suggested that each market center collect and validate its own data and transmit it to a central processor or service bureau for sequencing. The processor, which would function under a set of rules approved by the Commission, would be a "neutral" body, not under the control or domination of any particular market center. ...
The legislative history of the 1975 Amendments makes clear that Congress **shared** the Committee's view that any central processor of market information be neutral. In fact, Congress indicated it would have to consider the establishment of a quasi-governmental entity to operate a processor if rigorous standards could not be established to assure fair access for all affected interests in a privately-owned communication system, or if it became a vehicle for restricting competition. Any exclusive processor of market information in effect would be a public utility, and thus must function in a manner that is absolutely neutral with respect to all market participants. Accordingly, Section 1I IA granted the Commission broad powers over any exclusive processor of market information in order to assure, among other things, the processor's neutrality and the reasonableness of its charges.

In its rulemaking implementing the 1975 Amendments, the Commission provided for the registration of any exclusive SIP In addition, it established procedures through which national market system plans, jointly established by the SROs, are approved and overseen by the Commission. Each of the CTA, CQ, Nasdaq/UTP, and OPRA Plans have been filed with the Commission pursuant to these procedures."

While the processors generally received high marks,78 there were criticisms particularly of the CTA and CQ administration. Notably, these included skepticism that appropriate fee categories and levels were designated;"9 criticism of the length of time necessary for change or innovation;80 and criticism of plan governance, particularly by those excluded from participation.81

The Advisory Committee ultimately had a choice of three models to address those concerns.

First, a process model, similar to that which then operated, that would largely rely on broad and diverse securities industry participation in the governance of the SRO, and potentially also the governance of the networks. This model would continue deferential Commission review of fees.

Second, a public utility review of fee levels under which the Commission

would articulate a detailed cost-based approach to market information fees and rigorously enforce it. This approach was proposed in the Commission's December 1999 Concept Release.ez

Third, a model that emphasized competition rather than process or rate regulation. This was the model a majority of the Committee supported. In part, support for this model was based on the potential to reduce the administrative burdens of the current system, particularly in Network A. In part, NYSE support for this model may have been influenced by a belief that the CTA-CQ plan subsidized the regional stock exchanges.83 The Advisory Committee Report emphasized this model's advantages:
First, market participants would have a greater ability to innovate. Dissolution of the Plans' joint governance structure, combined with the force of competition, may allow for system modifications to occur more quickly in response to new technologies and market opportunities.

Second, there could be ancillary **gains** from dismantling the Plans. Today, competitors act in concert with respect to an important data dissemination activity. Dissolution of the consortia would remove the administrative burdens associated with joint administration, along with potential antitrust exposure. The administrative functions would be shifted to the individual market level, however, potentially adding administrative complexity at that level.

Third, the explicit information sharing arrangements imposed by the Plans on their participants would be eliminated. Removing this environment of artificial cooperation among competitors could enhance the forces of competition.

Finally, the revenue sharing arrangements under which market data revenues are allocated among Plan participants would be eliminated. Because each market would separately establish and collect its own fees, intermarket competition may be enhanced.84

No issue was considered by the Advisory Committee in greater detail than its recommendation of a competitive consolidators model. Six alternative competing models were submitted to the Advisory Committee.115 The Committee's only subcommittee, chaired by Georgetown University Law School Professor Langevoort, met separately to review these proposals and propose an agenda of issues concerning competing consolidators to the full Advisory Committee for discussion.sb The Advisory Committee recommendation was in part conceptual:

The competing consolidators model assumes that an SRO can fulfill its regulatory obligations with respect to market data without participating in a joint national market system Plan. If an SRO did not wish to participate in a joint Plan, it would be required to file a separate transaction reporting plan under the Transaction Reporting Rule that specifies, among other things, the manner in which last sale reports would be consolidated with those from other market centers. If the SEC approves the separate transaction reporting plan, after finding it is consistent with the national market system objectives of the Exchange Act, the SRO then would: (1) separately establish and collect its own fees; (2) separately enter into and administer its own market data contracts; and (3) provide its own data distribution facility Any number of competing consolidators could purchase market data individually from those SROs that have withdrawn from the Plans, and jointly from any remaining Plan participants. These "competing consolidators" would then consolidate the data and distribute it to end-users.87
Significantly, the Advisory Committee emphasized that the Commission in reviewing any petition to withdraw from a joint national market system plan or any new plan proposal, must assure that specified technological"" and

economic89 risks have been addressed effectively

The majority of the Advisory Committee believed that technological risks and economic costs and risks will prove manageable. I personally was impressed with the role that the Commission's Division of Market Regulation had played in negotiating the implementation of the considerably more complex Nasdaq SuperMontage plan.90 I anticipate a similar Division of Market Regulation role in preparing any new plan for a competing consolidator. It seems inevitable that one unavoidable cost of the new competing consolidator will be a greater SEC oversight role.91 The challenge to the SEC is clear. Unless the Commission does, if necessary, engage in meaningful rate review, there is a risk that exchanges will overprice or inappropriately tie market information products. I believe this is a manageable risk, but it will require SEC engagement.

The Reformed Unitary Consolidator Model

A minority of the Advisory Committee, in contrast, concluded that the costs and risks of a competing consolidator model outweighed its potential benefits. This minority recommended retention of the current unitary consolidator model.
Because the full Commission is not bound by an Advisory Committee recommendation, the Committee discussed how the unitary model could be improved if it was retained. These recommendations also represented those of a majority of the full Advisory Committee. They proved to be modest ones.

First, it was recommended that if a unitary consolidator is retained there be mandatory competitive bidding for the exclusive processor. The Advisory Committee was aware that under the current CTA-CQ Plans competitive bidding was possible and that the processor operates on a cost basis, thus reducing the likelihood of competitive bids. Nonetheless, a substantial majority of the Advisory Committee believed that a mandatory competitive bidding process could inspire greater technological innovation.92

Second, the Advisory Committee favored broadening participation in plan governance through a nonvoting advisory committee.

This approach was viewed as a way of providing earlier and better information on Plan issues to interested constituencies, as well as an opportunity for them to offer direct input into the decision-making process. At the same time, the voting rights of the SRO members, who have a more direct stake in the market information, would not be diluted.93

The Advisory Committee discussed whether voting provisions should be modified, for example, by reducing the approval thresholds or weighted votes. The majority ultimately favored retention of the one SRO-one vote rule,94 in part, because the Advisory Committee majority had already begun to coalesce around the competing consolidator model.

Third, the Advisory Committee generally recognized that pilot programs have led to the development of innovative market data products. The Committee supported their continuation "so long as they are limited in duration and scope, and are available on a non-discriminatory basis."95

Finally, although the Advisory Committee was keenly aware of "the interrelationship between market data fees, policies, contracts, billing and reporting requirements, and administration,"96 the strong preference of the Advisory Committee was to leave to the private sector a determination of what steps should be taken to streamline data administration.97

SEC Fee Review

The Commission's December 1999 Concept Release had been most noteworthy because of its proposed flexible cost-based or rate regulation approach to SEC review of market information fees and revenues.98

A substantial majority of the Advisory Committee rejected the proposed "flexible cost-based" standard. For some, the standard was rejected on prudential grounds as being resource-intensive, requiring arbitrary judgments on appropriate costs, or distorting economic incentives.99 For some, rejection was more philosophical. "The 'public utility' cost-based ratemaking approach is generally disfavored today"100 Certainly, the SEC's experience with fixed brokerage commission rates before 1975 had been a frustrating one in terms of the slowness of changing rates, the controversy rate changes engendered during the final years of the pre1975 period, and the difficulty of identifying an economic model for delineating appropriate costs.101

The Advisory Committee considered, but did not endorse, other alternatives for Commission rate review. 102 The Advisory Committee recognized that current SEC fee review gives considerable latitude to fee proposals and is, at least, implicitly based on a process model by which new fees are discussed before filing with vendors and subscribers. What made this process model attractive was a recent history of declining fee levels,101 some innovation in fee approaches, and dramatically rising last sale report and quote volume levels. 104 At the end of the day, the need for changes in fee review seemed less persuasive to a majority of the Advisory Committee than the opportunity to address frustrations in Plan administration and inspire faster technological change through a competing consolidator model.

THE ADVISORY COMMITTEE ON MARKET INFORMATION AND THE FUTURE OF THE NATIONAL MARKET SYSTEM

The potential restructuring of data consolidators recommended by the Advisory Committee portends a new approach to U.S. securities market structure issues. This approach recognizes both that advances in technology have made possible communications systems that appeared improbable or too risky earlier and that the objectives of the Securities Act Amendments of 1975 could be achieved with less direct government regulation.

There are broader implications to this recommendation. There is an inevitable interconnectedness to securities market structure issues.105 The significance of a new approach to market information, for example, is influenced by such questions as whether payment for order flow is permitted, how orders are executed, how markets are linked, how markets compete, and what will be the impact of combining for-**profit** and not-for-**profit** market center competitors.los There is a similar interconnectivity to most securities market structure issues. Although the Commission in day-to-day administration, as a practical matter, often has to address issues separately, the advantage of a periodic broader study is to appreciate how fundamental changes in securities markets should result generally in new policy

Let me outline several fundamental interconnected topics that should be part of any appropriately designed study of equity securities market issues today 107

How SHOULD QUOTE COMPETITION BE CONDUCTED?

Underlying the Securities Act Amendments of 1975 to the Securities Exchange Act is a general preference for competition as a means to best protect investors.

We have earlier explored this preference in the discussion of market information under the Securities Exchange Act and its contemplation of

quote competition. 10" This preference is also articulated in the legislative history of Securities Exchange Act section 6(e), which generally prohibits a national securities exchange from imposing any schedule or fixing commission rates, allowances, discussions, or other fees charged by its members. Although the background of this subsection is itself too long a tale to relate in detail,109 a few points are relevant here.

Lack of brokerage rate competition before 1975 was often criticized for encouraging anticompetitive practices in the securities markets.110

The initial five years of experience with unfixed rates demonstrated a wide array of economic advantages concomitant with negotiated or competitive brokerage commission rates."' SEC studies during the 1975 to 1980 period reported significant diminution in brokerage commission rates, the emergence of new competition through discount brokers, and enhanced securities industry profitability 112

In the first five years of competitive commission rates, no persuasive evidence emerged that investors had been injured by the "unbundling" of research and brokerage services. 13 Instead, the coexistence of full service brokerage firms offering investment research and advice, discount brokers offering brokerage but no investment research or advice, and investment advisers and publications offering only investment research and advice, gave investors the opportunity to purchase only those investment services they desired. The unfixing of securities industry commission rates generally benefitted investors by reducing transaction costs and permitting discount brokers and unbundled brokerage services, while simultaneously improving the overall health of the securities industry by contributing to an increase in **share** volume and stimulating greater broker-dealer firm efficiency without significant increases in securities industry concentration levels.

There was an important exception to the general preference of the 1975 Act for brokerage rate competition. In the same 1975 Securities Act Amendments that required negotiated commission rates, Congress enacted section 28(e) of the Securities Exchange Act, which created a safe harbor for institutional investors that purchased brokerage and research for a higher commission than they could have expended to only purchase brokerage. This is often called a "soft dollar" arrangement. Congress acted in response to the view of some institutional money managers

that, with the advent of competitive rates, they must direct a payment of no more than the lowest commission obtainable for a transaction, or else they will be subject to suit for violation of their fiduciary obligations. This result will occur, they contend, without regard for the quality of the broker's execution and settlement service on the research information which he may provide.... [Section 28(e) was intended] to preempt and overturn common law principles ... or any interpretation of State or Federal law which would expose fiduciaries to liability solely on the basis that they have failed to gain the lowest commission cost available.114

Congress was clear that:

a challenge to fiduciary conduct must be premised on the basis that a fiduciary has failed to use reasonable business judgment in selecting his broker and valuing the services rendered. It is, of course, expected that money managers paying brokers an amount which is based upon the quality and reliability of the broker's services including the availability and value of research, would stand ready and be required to demonstrate that such expenditures were bona fide.115

Section 28(e) was not intended to be unbounded in its exception to section 6(e)'s requirement of competitive brokerage commission rates. The section is limited to (i) money managers (that is, persons who exercise **investment discretion**) (ii) who pay a broker an amount in excess of what a competitive broker would have charged, (iii) if the money manager determines in good faith (iv) that the value of the commission was reasonable in relation to the value of brokerage and research services provided by the broker.

Section 28(e)(3) specifies that a person provides brokerage and research services when he or she:

(A) furnishes advice, either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities;

(B) furnishes analyses and reports concerning issues, industries, securities, economic factors and trends, portfolio strategy, and the performance of accounts; or

(C) effects securities transactions and performs functions incidental thereto (such as clearance, settlement, and custody) or required in connection therewith by rules of the Commission or a self-regulatory organization of which such person is a member or person associated with a member or in which such person is a participant.116

Although the Senate Committee Report accompanying the 1975 Act highlighted that "[t]he definition of brokerage and research services is intended to comprehend the subject matter in the broadest terms,"17 this was always subject to the scope limitation that "the touchstone for determining when a service is within or without the definition in section 28(e)(3) is whether it provides lawful and appropriate assistance to the money manager in the carrying out of his responsibilities."le

Although the wisdom or scope of section 28(e) has been and should continue to be debated,119 one pivotal point is clear. Section 28(e) was not intended to provide a safe harbor for a different and far more consequential practice called payment for order flow, by which OTC market makers or regional exchange specialists pay a rebate to customer's brokers for directing transactions to it rather than to another exchange which is usually the NYSE. 120

Few practices are more likely to subvert quote competition. Payment for order flow can not be justified as providing bona fide service to investors who pay a higher than competitive price for brokerage but also receive securities research. Payment for order flow is instead an extra payment to a broker to divert a customer's order to a particular exchange or OTC market maker. Any advantage to the investor that might occur because of payment for order flow is coincidental. The broker has a fiduciary duty to seek best execution of orders. 121

To be sure payment for order flow can be harmonized with a broker's best execution obligations. 122 It does support regional stock exchanges and, in theory, strengthens competition with the NYSE. In recent months, decimal stock trading with narrower price spreads appears to have reduced the magnitude of payment for order flow.123

That said, the practice of allowing regional stock exchanges or OTC market makers to tinker with price competition is anathema to the competitive policy objectives of the Securities Acts Amendments of 1975 and the general approach to competition taken by our antitrust laws.124

The policy question that deserves serious study today is whether the

practice of payment for order flow should be prohibited altogether. A key impediment to prohibition has been the ineffectuality of quote competition. A second impediment has been the Commission's tolerance of a number of similar anticompetitive practices such as reciprocal trading arrangements.125 Logically, each of these should also be reviewed.

The Commission approach to payment for order flow has not been a jewel of consistency In 1994, the SEC Division of Market Regulation published Market 2000, which concluded:

The Division believes that payment for order flow exists, in part, because it is difficult for markets to compete for order flow on the basis of quotations. ... [M]any small orders are executed through automated systems at the prevailing intermarket best bid or offer. Brokers find that manual routing of each small customer order to the market actually displaying the best quotation simply is not cost effective.

The lack of quote competition enables a specialist or dealer to acquire a flow of small orders without having to adjust its market making quotation. The order flow that is paid for, however, comprises only individual retail orders, which are easy trades for the market maker to handle. The market maker can afford to pay these "low-cost" customers.

Effective quote competition for retail orders could be achieved in a market system in which an order is sent to the market that first displays the best quote. . . . [T]he Division does not believe that there is sufficient reason to impose a uniform market design. ...

The Division believes that, at a minimum, customers need more information so they can monitor execution quality more closely where payment or inducement is provided. 116

In 1994, the Commission adopted amendments to Rule 10b-10 to require disclosure of payment for order flow in brokerage (or agency) transactions. 127 The Commission simultaneously adopted Rule 11 lAcl-3 to require broker-dealers acting as agents to disclose in writing when opening a new account their policies regarding payment for order flow.

At various times, individual options exchanges have initiated payment for options order flow programs. The CBOE program, for example, established a market fee of forty cents per contract, which is charged to all market makers. 128 Later in 2000, an SEC Special Study suggested that many of the anticipated advantages of multiple-listed options had been subverted by payment for order flow 129 A similar conclusion may also be appropriate for multiple traded stock.

In recent years, the Commission has been sensitive to a number of aspects of competition among market centers. Payment for order flow has been characterized as one of two major categories of economic inducements to brokers to route all or part of their order flow to a market center. Internalization also deserves serious study As the Commission aptly observed in a 2000 Release when the NYSE proposed rescinding Rule 390:

Internalization is the routing of order flow by a broker to a market maker that is an affiliate of the broker. An integrated broker-dealer, for example, internalizes orders by routing them to the firm's market-making desk for execution. In this context, the economic inducement for routing order flow is inherent in the common ownership of the broker and market maker....
From a broker's perspective, one of the primary motivations for internalization and payment for order flow arrangements is the opportunity to **share** in the **profits** that can be earned by a

market maker trading as principal against a substantial flow of market orders. Under internalization and payment for order flow arrangements, such orders are routed to a particular market maker that will have an opportunity to execute the orders as principal without facing significant competition from investors or other dealers to interact with the directed order flow. Moreover, the linkages among market centers that are currently in place do not require that market orders be routed to the market center that is displaying the best prices, even if that price represents an investor limit order. As a result, a market maker with access to directed order flow often may merely match the displayed prices of other market centers and leave the displayed trading interest unsatisfied. The **profits** that can be earned by a market maker trading at favorable prices with directed order flow can then be **shared** with the brokers that routed the orders. 30

HOW SHOULD SECURITIES TRADING BE ROUTED AND EXECUTED?

As the Commission's Division of Market Regulation recognized in 1994, "payment for order flow exists, in part, because it is difficult for markets to compete for order flow on the basis of quotations."131 Must this be so?
Consider competitive trading in the NYSE list of securities. Currently orders are usually routed from a broker-dealer to an NYSE specialist via an NYSE system called SuperDot,132 or to other exchange floors via separate electronic order routing systems. 133

Once an order is received by an exchange specialist, it either will be executed on that floor or forwarded to an exchange with a superior quotation via a central linkage system known as the Intermarket Trading System or ITS.134 Because it is at least theoretically practicable to design a broker-dealer to market center linkage that in a single step directs orders to the market center with the superior quote, the existing two step approach of SuperDot-ITS begs the question, why does a one step process not operate today?135

After the adoption of the 1975 Securities Act Amendments, the SEC gave extended consideration to a Universal Message Switch (UMS) that would electronically forward market orders to the exchange specialist or OTC dealer with the best quotation, based on price and then time priority The SEC considered also a Composite Limit Order Book (CLOB) that would allow limit orders to be stored and then executed when matching bids and offers were made, again on a time priority basis....

The SEC did not adopt an order requiring a UMS in 1978, the last time it was considered. Several objections were made to the UMS by the NYSE and others.

First, and most vehemently pressed, was the argument that routing orders on the basis of quotations deprived customers of the opportunity to receive superior prices from the crowd of floor brokers. To require execution at the quotation would prevent customers from securing "prices between the quotes." This is a legitimate concern. A key question is whether the lower transaction costs and speed of automated execution of small orders outweigh the advantages of seeking a better price from the crowd.

The NYSE also argued that the best quotation might not lead to the best price for the customer because of a number of other cost factors, including brokerage rates and service charges. As the NYSE put it, "[i]f the quotes are to be truly comparable, all service charges and fees must be identical. ...

A third argument made by the NYSE was that customers would be deprived of

the opportunity to route orders to the market that provided the best service.

The NYSE additionally made the argument that competition on the basis of quotations would not be effective unless the quotations were firm. This is clearly true. Unless regional exchange specialists and OTC market makers were willing to enter firm quotations, a UMS would not be feasible.136 But this has been addressed by SEC rules such as its quote rule.

Although the SEC was unwilling in 1978 to require an effective broker-tomarket center linkage, it did approve development of ITS. Essentially, ITS is a communications system that allows specialists and floor brokers on one exchange floor to transmit buy or sell orders to market makers on another exchange floor or over the counter to a NASD market maker. If a specialist or floor broker sees a better price in the Consolidated Quotation System available on another exchange, the ITS system requires transmission of a "commitment to trade" to the appropriate participating market. In the other market centers, the market maker there must either accept or decline the commitment. ITS relies on specialists and floor brokers to examine quotations displayed on screens above the specialists' posts, insert orders for electronic transmission to another market center, and make timely responses to commitments to trade from other market centers.

In 1999, nine markets-the NYSE, AMEX, Boston, Chicago, Cincinnati, Pacific, and Philadelphia Stock Exchanges, the Chicago Board Options Exchange, and the NASD participated in ITS. At the end of 1999, 5056 issues were eligible for trading on ITS, representing most of the stocks that were multiply traded. In 1999, ITS **share** volume was 5.4 billion **shares** or approximately two percent of aggregate consolidated tape volume.137
Given the theoretical merits of other order routing and market linkage systems, ITS has been likened to "two tin cans and a string" or "a tom-tom in the space age.18

SEC analysis of market quality in 1982 indicated that the ITS had not had an impact on primary market spreads, and there did not appear to be a significant difference between the level of price volatility for ITS stocks and non-ITS stocks.139 The NYSE estimated that the ITS saved investors approximately $40 million in 1981 by allowing market professionals on one exchange to obtain superior prices on other exchanges. 140 Normally, only seventy-eight to eighty percent of commitments to trade are executed. On October 19 and 20, 1987, only thirty-two and fifty-five percent of regional exchange commitments to trade were executed on the NYSE.141 This prompted the SEC staff to express concern "that the present configuration of ITS is not designed to perform efficiently in high volume periods." 142

In 1999, Chairman Levitt termed the ITS "archaic."143 A Market Structure Report published in 2000 by the New York Stock Exchange Special Committee on Market Structure, Governance and Ownership similarly proposed elimination of intermarket order routing linkages.144

A thoughtful SEC review of securities market order routing and order linkage is long overdue. Such a review should itself be linked to other issues such as the quotation system and payment for order flow. A quite different environment today exists than existed in 1978, in part, because of the type of new technology that prompted the Advisory Committee on Market Information to propose competitive consolidators; because decimalization has improved quotation spreads;145 and because a significantly larger number of orders today are routed electronically to specialists and market makers.

With SuperDot currently being enhanced to handle market and limit orders up to three million **shares** per order, the argument, for example, that orders must be forwarded to stock exchange floors to allow floor brokers the opportunity to provide superior quotations is an increasingly debatable one. 146

WHICH MARKET CENTERS SHOULD COMPETE?

Underlying the SEC approach to consolidated market information, order routing, order extension, and linkages, has been the emphasis on national securities exchanges (that is, stock and options exchanges) and securities associations as the primary means of regulation and the primary recipients of rights.

Until relatively recently, this was a time honored and stable approach. For decades there were a small number of registered stock exchanges 147 dominated by the NYSE,148 and one securities association, the National Association of Securities Dealers, which, in turn, long owned the NASDAQ, an electronic overthe-counter market. 149

This stable framework for securities markets is now eroding. A key dynamic has been the rapid emergence of ECNs. In 1994, the SEC Division of Market Regulation would explain about ECNs, then called proprietary trading systems (PTSs):

The development of PTSs primarily can be attributed to two factors. First, PTSs fulfill the needs of institutional investors not satisfied by the traditional markets. For example, some "matching systems" compliment the trading needs of patient investors who do not need the instant liquidity that exchange markets provide by allowing investors orders to meet directly at preannounced times during the day. Such matching of orders may reduce transaction fees, eliminate the bid-ask spread, and minimize the market impact of large trades. Second, technology has revolutionized securities trading and trading no longer must take place on the floor of annegotiated by telephone, but can be accomplished through networks of computer terminals. The sponsors of PTSs have developed sophisticated, innovative trading systems to accomplish this.

PTSs have combined technology and features that are attractive to institutional investors to gain an increasing **share** of volume in the past few years. For the first half of 1993, the total **share** volume on PTSs was 4.7 billion **shares**, which was almost the same amount as for the entire year in 1992. The total **share** volume for 1992 was nearly 4. 9 billion, up more than 60 percent from 199 I's volume of 2.9 billion. Most of the PTS volume has been in securities included for quotation on the National Association of Securities Dealers Automated Quotation System ("NASDAQ"). Almost 87% of the PTS volume in the first half of 1993 was in NASDAQ stocks, and only 13% in listed stocks. 150

An ECN is not obviously a securities exchange,"' a "facility of an exchange," 152 or a member of an exchange or securities association.153 While ECN trading volume was small, the SEC issued no-action letters permitting ECNs to avoid exchange registration even though ECNs then were performing at least some of the functions of an exchange.154

Between 1994 and 1998, ECNs were subjected to a record-keeping and reporting regulation under former Rule 17a-23. 155

In 1998, the Commission adopted a comprehensive new approach to ECNs, allowing them to choose whether to register as a national securities exchange or to register as a broker-dealer and comply with additional requirements under a new Regulation ATS (Alternative Trading System),

depending on activity and trading volume.156

Rule 3b-16 interprets the statutory definition of exchange under section 3(a)(1) of the Exchange Act. The Commission interpreted this definition to recognize that advanced technology had blurred the distinction between such classifications as "exchange" and "broker-dealer" and that alternative trading systems increasingly were being used by broker-dealers as the functional equivalent of exchanges.

Under Rule 3b-16(a) an organization, association, or group of persons will be considered to "[c] onstitute [ ], maintain[1, or provide[ ] a marketplace or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange"157 as stated in section 3(a)(1) if such organization, association, or group of persons:

(1) Brings together the orders [for securities] of multiple buyers and sellers; and...

(2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade."8

On the other hand Rule 3b-16(b) expressly excluded from the definition of an exchange: (i) systems that solely route orders to a national securities exchange, a national securities association, or a broker-dealer for execution; (ii) systems that allow persons to enter orders for execution against the bids and offers of a single dealer and only as an incidental part of this activity match orders that are displayed to any person other than the dealer; and (iii) systems operated by a registered market maker to display its own limit orders or those of other broker-dealers' customers, to match customers orders with the displayed limit orders, and as an incidental part of its market maker activities to cross or match nondisplayed orders to other persons than the market maker. 159

Rule 3a1-1 exempts most alternative trading systems from the definition of an exchange by providing an exemption if the systems comply with Regulation ATS. The Rule 3a1-1 exemption, however, is not available to any system that during three of the four preceding calendar quarters had fifty percent or more of the daily dollar trading volume in any security and five percent or more of the average dollar daily trading volume in any class of securities (defined for equities to have the same meaning as in Rule 3a1 1l-1) or forty percent of the dollar volume in any class of securities and the Commission determines, after notice and opportunity for a response that registration as an exchange would be necessary or appropriate. 161

Regulation ATS defines an eligible alternative trading system (ATS) in Rule 300(a) as one that:

(1) Constitutes, maintains, or provides a marketplace or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange under Exchange Act Rule 3b-16; and

(2) does not [(i)] set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system, or [(ii)] discipline subscribers other than by exclusion from trading. 161

Under Rule 301 (b), each ATS must register as a broker-dealer under section 15 of the Exchange Act.162

From the perspective of attempting to harmonize the new technology of the ECNs with a 1934 statute, the Commission should be lauded for its resourcefulness and sensitivity

Periodically, however, Congress or the SEC should step back and question whether the conceptual structure of the Exchange Act continues to be appropriate. Should exchanges continue to be the basic securities markets of the Securities Exchange Act or should a more capacious concept including, for example, ECNs succeed the earlier statutory role performed by exchanges?

The answer to this inquiry is neither obvious nor simple. Increasing the number of market centers and combining this increase with more effective order execution systems could prove to be a significant stimulant to enhanced quote competition. On the other hand, ECNs that operate as broker-dealers or alternative trading systems do not comply with significant obligations currently imposed on exchanges [163] or their members, notably including an exchange specialist's duty to be a buyer of last resort in a declining market. [164]

A thoughtful study of what market centers should compete necessarily must consider what rules should be applicable to market centers. Only within the context of applicable rules, are differences between types of markets or market participants meaningful. Let me illustrate this point by focusing on one cluster of market structure rules.

In 2000, the Commission, to its considerable credit, caused the securities exchanges to rescind rules such as NYSE Rule 390. Rule 390, with exceptions, prohibited a NYSE member firm from making a competitive market in a stock listed on the NYSE before April 26, 1979.[165] In causing the rescission of Rule 390 in 2000, the Commission stated in part:

Rule 390 long has been questioned by the Commission and others because it directly restricts a certain type of market center competition-competition between exchange markets and markets other than exchange markets. Given the explicit national market system objective to assure fair competition among market centers, as well as the requirement that the rules of a national securities exchange not impose any burden on competition not necessary or appropriate in furtherance of the Exchange Act, Rule 390 has been suspect on its face.

The NYSE has defended Rule 390 on the basis that is [sic] purpose was not to protect the NYSE's competitive position, but to protect customer interests by assuring a greater opportunity for interaction of investors' orders without the participation of a dealer. This type of order interaction is also a principal objective of the national market system set forth in section 1 1A(a)(1)(C)(v) of the Exchange Act. . . .

The Commission believes that whatever beneficial effect Rule 390 may have in enhancing the interaction of investor orders can no longer justify [its] anticompetitive nature. To the extent the Rule promotes the interaction of investors' orders, it does so in an undesirable way-by attempting a direct restriction on competition. Such attempts can never be wholly successful and typically succeed primarily in distorting, rather than eliminating, competition and introducing unnecessary costs. An egregious effect of Rule 390 is the artificial incentive it provides for NYSE members to route orders to foreign OTC markets for execution after regular trading hours. Such distortions can no longer be justified in an increasingly competitive international environment.
In addition, Rule 390 is much too broad even when considered solely as a tool to address market fragmentation and to promote the interaction of

investor orders. As noted by several commentors, the Rule effectively restricts NYSE members from participating in markets operated by ECNs or ATSs. These market centers offer their customers, among other things, agency limit order books that provide a high degree of investor order interaction. Using advanced technology for communicating and organizing information, ECNs can offer a number of advantages to investors, including low costs, fast display of limit orders, and fast executions against displayed trading interest.

These ECN limit order markets also can benefit the national market system as a whole by enhancing the process of public price discovery. Displayed limit orders are perhaps the most significant source of price competition in the securities markets. Limit order markets also allow for both investor and broker-dealer participation, but minimize principal-agent conflicts by adopting trading rules that establish a level playing field for the trading interest of both investors and broker-dealers-principally through price/time priority rules. Whatever limit order is first in line at the best price, whether submitted by investor or broker-dealer, such limit order has the right to trade first at that price. Price competition is invigorated and spreads are narrowed because those who improve the best bid or offer through limit orders know that they will be the first to trade. The price/time priority rules of limit order markets also can enhance depth and liquidity by providing an incentive for trading interest to stack up at prices that are at or around the best bid and offer. Because the second, third, and fourth orders in line at a price will be the second, third, and fourth to trade at that price (and so on), there is a strong incentive to submit limit orders even at prices that match or are outside the best bid or offer. The deeper a market, the less vulnerable it will be to excessive short-term price swings. 166

After NYSE Rule 390 was rescinded, the Commission adopted Rules 1lAcl-5 and 1 lAcl-6 to, among other points, improve public disclosure of order routing and execution practices. 167 In adopting those rules, the Commission emphasized disclosure as a minimum step to address market fragmentation.

Given the long history of efforts to rescind Rule 390 and the complex history of automated order execution systems, there is considerable reason for skepticism as to whether a disclosure approach to fragmentation in a far less than perfect order linkage system will prove to be the wisest approach. At the very least, fragmentation of orders into unconnected market centers and internationalization of orders within broker-dealers or ECNs are issues that should be revisited in the context of a thorough study of securities market structure.

CONCLUSION

There is an interconnectedness in securities market structure issues that makes their simultaneous study advisable. How securities markets operate is determined by the interaction of factors such as technology, investor and broker-dealer behavior, the number and nature of market center competitors, and the ways in which market center competition is regulated.169 Change in any of these variables can result in change in the operation of securities market center competition.

To best study securities markets requires a detailed factual investigation of current and potential technology,170 the increasingly international context of U.S. securities markets,171 the changing nature of investors and broker dealers, 172 and trading strategies. Against that background, the type of structural issues discussed earlier can best be assessed. 173 This study or a subsequent review could assess whether current trading rules such as the short sale rule 174 or the specialist's alternative obligations to purchase stock in a declining market 171 continue to be appropriate.

For some time, there has been resistance at the SEC to the type of Special Study of Securities Markets conducted from 1961 to 1963 that ultimately contributed to a generation of statutory and rule changes between 1964 and 1975. The time involved in such a study, it is argued, is simply too long in today's faster moving markets. Leadership of the study can be highly variable and today runs the risk of being politicized.
These are serious and substantial concerns. They appear to militate in favor of the type of SEC Commissioner led study conducted by Commissioner William 0. Douglas during the New Deal176 or Commissioner Francis Wheat in the post World War II period.177 Such a study, particularly if led by a Commissioner with the trust of the SEC Chairman, can be initiated faster than a congressionally mandated Special Study, work with the already established Division of Market Regulation, and be more properly modified over time in terms of objective or schedule.

The keys to such a study are practical. What is its scope? How long does it have to report? How many and which staff will be allocated to the study? As with the New Deal studies of this type, a strong case can be made for emphasizing fact finding and a public record as a means to develop an informed basis for conclusions. Public hearings can focus attention on pivotal issues and then lead to more detailed fact gathering. As with the 1961 to 1963 Special Study of Securities Markets, it is also wise to preserve the ability of the drafters of a report to be able to meet and discuss issues outside of a public record.

There are no panaceas here. No approach is without cost. But as the need for a thorough review of the securities markets increases, the willingness of the Commission to consider a more comprehensive review should also increase.
1. REPORT OF THE SEC ADVISORY COMMITTEE ON MARKET INFORMATION: BLUEPRINT FOR RESPONSIDLE CHANGE (2001), at http://wwwsec.gov/divisions/marketreg/marketinfo/finalreport.html [hereinafter ADVISORY Comm..

2. The Report defined price transparency to mean:

the extent to which market information is made publicly available on a prompt and widespread basis. A fully transparent marketplace for a security would, for example, publicly distribute, on a real-time basis, information that accurately reflects: (1) the price and size of all definitive trading interest, including specialist and market maker quotes and customer limit orders, in a given security; and (2) the trade price and volume of completed transactions from all markets trading that security

Id. II(B).

3. Id. VII(A)-(B).

4. Id. III(A)(1)(3). A "reporting market center" would mean, among other things, all stock exchanges that trade a specific stock. Id. at n.20; see 17 C.ER. 240.llAcl-2 (2001).

5. In 2001, Nasdaq, a wholly owned subsidiary of the NASD, announced its intent to become a publicly traded public company and filed an application for registration as a national securities ex

change. This application will require SEC approval. Exchange Act Release No. 44,396, 66 Fed. Reg. 31,952 (June 13, 2001).

6. ADVISORY COMM. REPORT, supra note 1, II(A). The Advisory Committee Report explained: Information about the securities markets can be obtained in several different varieties and formats. The most basic form of market

information is the best quotation and last sale data, including the number of **shares**, with respect to a particular security at a given [point in] time. The best quotation is the highest bid and lowest offer (or ask) price currently available for a security The highest bid from U.S. exchanges and Nasdaq (currently a majority-owned subsidiary of the NASD) is commonly referred to as the "national best bid or offer" or "NBBO." An investor who asks for a quote on IBM might be told "113.50 to 113.55, 10 + 50." This means that the best bid price-the highest price any buyer in these markets is willing to pay-is currently $113.50 per **share** and that the buyer is willing to buy 1,000 **shares** at that price. It also means that the best offer-the lowest price at which any seller in these markets is willing to sell-is $113.55 per **share** and that the seller is willing to sell 5,000 **shares**. A market center identifier also accompanies each bid and offer to indicate the market center that posted the best bid or offer. Last sale data generally identifies the price at which the most recent trade in a particular security occurred, the size of that trade, and the market in which the trade took place.

id.

7. Id. VII(F). When a customer does not want to own or sell at the market price, the customer can enter a limit order to buy or sell at a specific price above or below the market price. For example, a customer might enter an order to sell IBM at $115, when the quotation for sales is $113.50. This order would be entered in a limit order book by a specialist who makes a market in IBM and executed when the price rises to $115.

8. Id. VII(C). 9. Id.

10. Id. VII(C)(3)(a).

11. Id. VII(D). For the SEC December 1999 Concept Release, see Exchange Act Release No. 42,208, 64 Fed. Reg. 70,613 (Dec. 17, 1999).

12. ADVISORY Comm. REPORT, supra note 1, VII(D)(3). 13. Id. VI(E)(1)(b).

14. See infra notes 17-104 and accompanying text.
15. See generally Joel Seligman, Another Unspecial Study: The SEC's Market 2000 Report and Competitive Developments in the United States Capital Markets, 50 Bus. LAw. 485 (1995).

16. See infra notes 105-68 and accompanying text.

17. This insistence on competition dates back at least to 1936, when the SEC, reversing the intention of section 12(f) of the 1934 Securities Exchange Act, persuaded Congress to permit the continuance of unlisted trading on the regional exchanges. Such "multiple trading" of securities limited the ability of the NYSE to monopolize trading in its list of securities. The SEC defended its policy favoring multiple trading in 1940, when it ordered the NYSE not to carry out plans to enforce rules penalizing member firms from trading NYSE listed securities on other exchanges. This meant that NYSE member firms that were also members of a second exchange could continue to trade NYSE listed securities on the second exchange. See JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 138-40, 232-35 (rev. ed. 1995).

18. 1999 SEC ANN. REP. 192-93. 19. Id.

20. See 6 Louis Loss &JOEL SELIGMAN, SECURITIES REGULATION 2769-87 (3d ed. 1990).

21. Pub. L. 94-29, 89 Stat. 97 (1975) (codified in scattered sections of 15 U.S.C.). 22. Id. sec. 7, IIA(a)(1), 89 Stat. at 111-12.

23. S. REP. No. 93-865, at 5-9 (1974).

24. Id. at 5-6; SUBCOMM. ON SEC. SENATE COMM. ON BANKING, Hous. dT URBAN AFFAIRS, 93D CONG., SECURITIES INDUSTRY STUDY 10 (Comm. Print 1973); Div. OF MKT. REG., SEC, THE OCTOBER 1987 MARKET BREAK 7-1 to -7 (1988); see generally Milton H. Cohen, The National Market System-A Modest Proposal, 46 GEO. WASH. L. REv. 743 (1978).

25. 17 C.FR. 240.11Aa3-1 (2001). For a history of the adoption of this rule, see Joel Seligman, The Future of the National Market System, 10 J. CORP. L. 79, 86-90 (1984).

26. See Exchange Act Release No. 10,787, 39 Fed. Reg. 17,799 (May 20, 1974) (declaring CTA Plan effective). Rule 11Aa3-2 sets forth procedures for SEC approval of such plans and plan amendments. 17 C.ER. 240.11 lAa3-2.

27. Seligman, supra note 25, at 88-89.

28. REPORT TO THE SECURITIES EXCHANGE COMMISSION BY THE ADVISORY COMMITTEE ON MARKET DISCLOSURE ON A CONSOLIDATED QUOTATIONS SYSTEM, reprinted in [1972] SEC. REG. & L. REP. (BNA) No. 178, at H-1 (Nov. 22, 1972), Regarding the evolution of the Consolidated Quotation Plan, see Seligman, supra note 25, at 90-93; Norman S. Poser, Restructuring the Stock Markets: A Critical Look at the SEC's National Market System, 56 N.Y.U. L. REv. 883, 918-22 (1981).

29. SEC, POLICY STATEMENT ON THE STRUCTURE OF A CENTRAL MARKET SYSTEM, reprinted in 196 SEC. REG. & L. REP. (BNA) D-10 (1973).

30. Exchange Act Release No. 12,670, 41 Fed. Reg. 32,856 (Aug. 5, 1976) (proposal); Exchange Act Release No. 13,626, 42 Fed. Reg. 32,418 (June 24, 1977) (reproposal); Exchange Act Release No. 14,415, 43 Fed. Reg. 4,342 (Feb. 1, 1978) (adoption); Exchange Act Release No. 37,619A, 61 Fed. Reg. 48,290 (Sept. 12, 1996). As amended, Rule 11Acl-I requires an exchange specialist or OTC marketmaker to make publicly available the price of any order it places in an electronic communications network (ECN) if the ECN price is better than the specialist's or OTC marketmarker's public quotation. Id.

31. 5 Louis Loss &JOEL SELIGMAN, SECURITIEs REGuLATioNs 2572 (3d ed. 1990) (quoting report to the SEC by the Advisory Committee on Market Disclosure on a Consolidated Quotations System). 32. See supra notes 4-6 and accompanying text.

33. ADVISORY COMM. REPORT, supra note 1, III(B)(1) (footnotes omitted). 34. The Advisory Committee Report explained that with respect to Nasdaq

On January 19, 2001, the SEC approved a new Nasdaq system, SuperMontage. In its order approving the SuperMontage system, the SEC stated its intention to require, as a condition for extending the Nasdaq(UTP Plan beyond its March 2001 termination date, that Nasdaq and the other Plan participants negotiate revisions to the Nasdaq/LJTP Plan that provide for a new exclusive SIP or for multiple non-exclusive SIPs. If the revised Plan provides for an exclusive SIP, there will be a presumption that the SIP should not be a Plan participant (e.g., Nasdaq), but that presumption can be overcome under certain conditions.

Id. III(B)(3) (footnote omitted).

35. With respect to OPRA, the Advisory Committee Report explained that

The OPRA System disseminates market information for series of options contracts traded by an OPRA Plan participant. A stock option is a contract that gives the buyer the right, but not the obligation, to buy or sell **shares** of the underlying security or index at a specific price for a specified period of time .... Exchange-listed stock option contracts generally are for 100 **shares** of the underlying stock .... The OPRA Plan participants are Amex, CBOE, [International Stock Exchange] ISE, PCX, and Phlx. The OPRA System is administered by OPRA, a committee made up of one representative from each of the parties to the OPRA Plan. OPRA is a registered SIP under Section 11A(b) of the Exchange Act. OPRA administration is handled by persons who nominally are employees of CBOE, but who report to all Plan participants. OPRA has contracted with SIAC to act as its processor.

Id. III(B)(4) (footnotes omitted). 36. Id. III(C).

37. The Advisory Committee Report amplified:

Each Network's basic agreement (i.e., the vendor form and professional subscriber form) contains a standard set of terms and conditions for use by all vendors and subscribers of the same class. Attached to each basic agreement is an "Exhibit A" or "Attachment A" ("Data Feed Questionnaire"), which is unique to each vendor or subscriber. Because the Data Feed Questionnaire describes the particular manner in which the vendor or subscriber intends to receive and use the market data, vendors and subscribers are required to disclose certain confidential and sensitive information about their business operations and use of market information. This information includes how the firm will use the data, the type of services [the firm] provides, [the firm's] technology for distributing and displaying market data, and how [a firm] monitors its internal users (e.g., customer service representatives in branch offices or call centers). . . . Due to the confidential nature of the information disclosed in the Data Feed Questionnaire, individual vendor and subscriber agreements are not publicly available.

Id. III(D)(1) (footnotes omitted).

38. The Advisory Committee Report generalized:

Some believe that the administration of the Networks creates substantial and unjustifiable burdens on vendors and subscribers, as a result, among other things, of (a) the wide discretion given to the Plan administrators in interpreting market data contracts, (b) the Networks' Data Feed Questionnaire rPnirPmanrc anri (rl the rwtc of rnmnlex contrart adminktratinn inrnrrP(i hv by datA mcPrc

Id. III(D)(2).

39. Under the CTA and CQ plans, SIAC is the exclusive processor of Networks A and B. SIAC receives last sale and quote information electronically, and calculates volume data, index data, and an NBBO that identifies the applicable market center. At the time of the Advisory Committee Report, SIAC provided a consolidated feed to eighty-six entities consisting of SROs, press organizations, vendors, and broker-dealers. The vendor, as well as some broker-dealers, in turn, would provide data feed service to end users. At the time of the Advisory Committee Report, there were approximately 1500 information users receiving consolidated market information through a data feed provider These information users, typically broker-dealers and institutions, in turn would distribute data to employees and retail customers. SIAC performs its data processing at cost. In 2000,

SIAC Network A and B costs were $7,743,000. Id. III(E)(1).

40. Id. III(E)(4)(a). Furthermore,"[iln March 2001, the NYSE enabled its specialists to voluntarily disseminate a depth indication and depth condition to indicate that there is additional market interest in a security not shown in the published NYSE quotation" by communicating, for example, in Phase I that there is at least 20,000 **shares**
interest in a security within fifteen cents of a published bid or offer. Id.; Exchange Act Release No. 44,084, 66 Fed. Reg. 16,307 (Mar. 23, 2001).

Under the Nasdaq SuperMontage plan, Nasdaq market makers, ECNs and exchanges trading Nasdaq securities may enter multiple quotes or orders at the same or different prices. This trading interest can be entered on a nonattributable basis. Anvtsoi COMM. R?PoRT, supra note 1, l III(E)(4)(c). ECNs, such as Island and Archipelago, also have begun to make their limit order books available through the Internet at no charge. Id. III(E)(4)(b).

41. The Advisory Committee Report described the regulatory framework of SIPs:
Congress was particularly concerned about entities that would be exclusive processors of market information for SROs (including the SROs themselves). It noted that any such processor would be, in effect, a public utility, and thus must function in a manner that is absolutely neutral with respect to all market centers, all market makers, and all private firms. Section 1 1A of the Exchange Act granted the SEC broad powers over any exclusive processor, including the responsibility to assure the processor's neutrality and the reasonableness of its charges.

Section 1 lA(b)(1) of the Exchange Act requires registration with the SEC of any SIP that is an exclusive processor. An "exclusive processor" is defined in Section 3(a)(22)(B) as any SIP or SRO that, directly or indirectly, engages on an exclusive basis in collecting, processing, or distributing the market information of an SRO. If a registered SIP limits the access of any person to its services, Section 1I IA(b)(5) provides for SEC review of that limitation. The SEC may uphold a limitation on access only if it is consistent with the Exchange Act and the rules thereunder, and the entity subject to the prohibition or limitation has not been discriminated against unfairly If the SEC cannot make this finding, or if the prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, the SEC must set aside the limitation on access.

Id. IV(A) (footnotes omitted).
42. Id. IV(C).

43. The Advisory Committee Report stated that "[t]he SEC has reviewed market information fees under the Exchange Act Section 1 IA(b)(5) 'denial/limitation of access' provision on only two occasions. The first involved OPRA and several information vendors; the second involved the NASD and Instinet." Id. IV(C)(3); see also Nat'l Assn of Sec. Dealers, Inc. v. SEC, 801 F2d 1415 (D.C. Cir. 1986).

44. ADvisoRY COMM. REPORT, supra note 1, IV(D)(1); see also Exchange Act Release No. 42,208, 64 Fed. Reg. 70,613, 70,615 (Dec. 17, 1999) (market information revenues were equal to twentyone percent of all SRO income in 1998).

The Advisory Committee Report further explained that:

The various fee structures that have been established by the Networks for the dissemination of market information reflect a vendor/subscriber dichotomy Vendors contract directly with the Networks for the right to

receive information and distribute it to their customers (e.g., brokerdealers, institutional investors, and individual investors). Vendors pay a variety of access and usage fees to the Networks.

Professional subscribers may contract directly with the Networks for receipt of market information, but generally obtain access to information through a vendor. Broker-dealers that both use information internally and distribute it to others (e.g., their brokerage customers) act as both vendors and subscribers.

Each of the Networks receives the vast majority of its revenues through subscriber fees. The most significant subscriber fees fall into two categories-monthly and per-query Monthly fees entitle the subscriber to an unlimited amount of real-time market information during the calendar month. Monthly fees are charged to professional subscribers on a per-device basis and to nonprofessional subscribers on a per-customer basis. Under the per-query fee structures, subscribers are required to pay an amount for each request for a packet of real-time market information. ... 1. Professional Subscriber Fees

Monthly fees for professional subscribers generally range from $18.00 to $127.25 per Network. Based on an average of 21 trading days per month, a professional subscriber generally is charged from approximately $0.85 to $6.00 per trading day for market information. ... 2. Retail Investor Fees

The monthly fee currently applicable to retail investors is $1.00 for unlimited access to a particular Network's core information, and the per-query fees range from $.0025 to $.02. The revenues from fees applicable to retail investors (which include monthly fees for nonprofessional subscribers and per-query fees) have grown rapidly in recent years, increasing from $3.7 million in 1994 to $115 million in 2000. This increase is attributable to the shift in data dissemination to retail investors from the telephone/registered representative channel to the on-line channel, and the resulting increased demand by retail investors for market data, and not to fee increases by the SROs. In fact, per-query fees have fallen in recent years. These revenues now represent approximately 19% of total market information revenues.

3. Fee Discounts

The fee structures for Network A, Network B, and the OPRA System include various discounts that are based on the size of the subscribing firm or on whether the firm is a member of an SRO that is a participant in the particular Network. They include: (1) a Network A and Network B "enterprise arrangement," adopted in 1999 and 2000, respectively, that caps the aggregate amount a registered broker-dealer must pay for most of the information services provided to its employees and customers at $500,000 per month; (2) an OPRA "enterprise rate" for professional subscribers of $10 per month for each registered representative; (3) Network A monthly professional subscriber fees that range from $18.75 per device for subscribers with more than 10,000 devices to $127.25 for subscribers with a single device; (4) OPRA monthly professional subscriber fees that are $6-$10 less per device for members of an SRO that is a participant in OPRA than for non-members; (5) Network A nonprofessional

47. Summarizing the recent background, the Advisory Committee Report stated:

The move to decimal pricing happened over the course of several years. In [a 1994] report, the SEC's Division of Market Regulation recommended eliminating the one-eighth pricing system to improve intramarket transparency Division of Market Regulation, Market 2000Current Equity

Market Developments (January, 1994). The Division noted that the minimum variation of one-eighth could cause artificially wide spreads and hinder quote competition.... By January 29, 2001, all exchange-listed stocks and options on those stocks were converted to decimal pricing. All Nasdaq securities and options on those securities were quoting in decimals by April 9, 2001.

ADVISORY COMM. REPORT, supra note 1, IV(A)(3) n.161.

48. Id. V(A)(2) (footnote omitted). The Advisory Committee Report explained:

Both NexTrade Holdings and Island ECN submitted Form 1 applications under the Exchange Act, seeking registration as national securities exchanges pursuant to Section 6 of the Exchange Act. 15 U.S.C. 78f. In May 2000, the Pacific Exchange became the first U.S. stock exchange to demutualize part of its business, when the SEC approved the conversion of its equity business into a wholly-owned subsidiary, PCX Equities, Inc. In the interim, PCX has finalized an arrangement with the parent holding company of ECN Archipelago ("ARCA") and has filed proposed rule changes by which a separate affiliate of that holding company would become a facility of the PCX, and replace the PCX equities business.

Id. IV(A)(2) n.158.

49. The Advisory Committee Report explained that:

Nasdaq, which had been a wholly-owned subsidiary of the NASD, has completed a two-part private placement of its securities. In addition, in March 2001, a private equity firm signed an agreement to purchase $240 million of debentures, convertible into Nasdaq common stock at any time during the next five years. On April 26, 2001, Nasdaq announced its intent to become a publicly traded company, and is currently reviewing the timing of its initial public offering. Nasdaq's application for registration as a national securities exchange under Section 6 of the Exchange Act was recently published for public notice and comment. See Exchange Act Release No. 44,396, 66 Fed. Reg. 31,952 (June 13, 2001). The NYSE has also considered the costs and benefits of converting to a for-**profit** exchange, but has recently announced that it plans to remain as a mutualized membership organization.

Id. at n.159.

50. Id. V(A)(1).

51. See Exchange Act Release No. 42,208, 64 Fed. Reg. 70,613 (Dec. 17, 1999). 52. See ADvisoRy COMM. REPORT, supra note 1, IV(B)(1) & n. 166.

53. Id. V(B)(1). 54. Id. V(B)(2). 55. Id. V(B)(3). 56. Id. V(B)(4). 57. Id. V(B)(5). 58. Id.

59. Id. V(B)(6).

60. Id. V(B)(7). The Advisory Committee Report explained:

In April 2000, the NYSE Board of Directors authorized it to seek SEC approval to withdraw from the CTA and CQ Plans . JW]ithdrawal from an effective transaction reporting plan requires SEC approval. Among other factors that would be considered before approving such a request, the SEC must be assured that the exchange's individual transaction reporting plan specifies an effective manner in which transaction reports would be consolidated with the reports from other exchanges. Id. IV(B)(7) n.200.

61. The other Advisory Committee members were: Michael Atkin, Vice President, Financial Information Services Division, Software and Information Industry Association; Harold S. Bradley, Senior Vice President, Investment Management, American Century; Robert G. Britz, Group Executive Vice President, New York Stock Exchange; Andrew M. Brooks, Vice President, Head of Equity Trading, T. Rowe Price; Matthew S. DeSalvo, Managing Director, Morgan Stanley Dean Witter; Carrie E. Dwyer, General Counsel & Executive Vice President, The Charles Schwab Corporation; Joel Greenberg, Managing Director, Susquehanna Partners, GP; William R. Harts, Managing Director, Salomon Smith Barney; David A. Hunt, Partner, McKinsey & Company; George K. Dennison, Senior Managing Director, Retail Equity Group, First Union Securities; Professor Simon Johnson, Sloan School of Management, Massachusetts Institute of Technology; Edward J. Joyce, President dr Chief Operating Officer, Chicago Board Options Exchange; Thomas M. Joyce, Managing Director/Head of Equity Market Structures, Merrill Lynch; Richard Ketchum, Deputy Chairman & President, Nasdaq; Professor Donald C. Langevoort, Georgetown University Law Center; Bernard L. Madoff, Bernard L. Madoff Investment Securities; Mark A. Minister, Chief Executive Officer, Brokerage and Transaction Operations, Sungard Data Systems; Edward Nicoll, Chairman & Chief Executive Officer, Datek Online Holdings Corp.; Paul O'Kelly, Chief Operating Officer, Chicago Stock Exchange; Kenneth D. Pasternak, President & Chief Executive Officer, Knight Trading Group; Gerald D. Putnam, Chief Executive Officer, Archipelago; Peter Quick, President, American Stock Exchange; Eric D. Roiter, Senior Vice President & General Counsel, Fidelity Management & Research Co.; and Devin Wenig, President, Reuters Information.

Let me particularly express my gratitude to Georgetown University Law Professor Donald Langevoort who chaired a Subcommittee on Alternative Market Data models; Annette Nazareth, Director of the Division of Market Regulation; Robert Colby, Deputy Director of the Division of Market Regulation; David Shillman, Counsel to the Director of the Division of Market Regulation; and Anitra Cassis, Special Counsel of the Division of Market Regulation. David Shillman and Anitra Cassis deserve special gratitude for their substantial efforts on behalf of the Advisory Committee.

62. SEC, Advisory Committee on Market Information, reprinted in ADVISORY Com. REPORT, supra note 1, app. A, available at http://www.sec.gov/divisions/marketreg/marketinfo/a.htm.

63. H.R. REP. No. 94-229, at 93 (1975). On July 26, 2001, Marc Lackritz, president of the Securities Industry Association, testified before the House Financial Services Capital Markets Subcommittee:

To legislate in this area would disrupt the regulatory and contractual regimes that make real-time market information so widely available today ... We do not believe that Congress or the courts have ever granted securities information processors exclusive ownership rights to market information, and to do so now would be a mistake ....

Conferring new property rights could impede the flow of real-time market information because, as single-source monopolies, the markets could charge excessive fees and restrict the downstream use of the information.

Richard Hill, SIA President Testifies Laws To Grant New Ownership of Data Would Disrupt Availability, 33 Sec. Reg. & L. Rep. (BNA) 1115 (July 30, 2001) (quoting statement of Marc Lackritz, Market Data II: Implications to Investors and Market Transparency of Granting Ownership Rights over Stock Quotes: Hearing Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, 107th Cong. (2001), available at http://www.house.gov/financialservices/072601ml.pdf).

64. ADvISORY COMM. REPORT, supra note 1, VII(A).

65. Id.; see, e.g., Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 E3d 266 (3d Cir. 1998). The best execution duty "requires that a broker-dealer seek to obtain for its customer orders the most favorable terms reasonably available under the circumstances." Id. at 270. Because this duty is based both on the common law and federal securities law, it could still be applied against brokerdealers even if changes in the vendor display or other SEC rules made it more difficult for brokerdealers to discover competitive market center quotations. See generally id. at 270-74.

66. ADVISORY COMM. REPoRT, supra note 1, VII(A).

67. Id. 68. Id. 69. Id.

70. Dissemination and Display of Transaction Reports, Last Sale Data and Qualification Information, Exchange Act Release No. 16,590, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) 82,456, at 82,936 (Feb. 19, 1980).

71. Id.

72. ADvisoRY Comm. REPORT, supra note 1, VII(B)(1). In the options markets a majority favored production of a consolidated NBBO, rather than a market-by-market NBBO, including disclosure of the size of orders. A majority also favored following the equity markets and requiring disclosure of market identification of the NBBO. Four of the five options exchanges, however, opposed disclosure of market identifiers, primarily because of system capacity contents. A minority of the Advisory Committee opposed an SEC mandate of the NBBO and implicitly favored an OPRA agreement to provide it. See id. VII(E)(1)(b).

73. Id. VII(B)(1) (footnote omitted). A minority of the Advisory Committee favored elimination of the mandatory NBBO rule. These Committee members urged that vendors and broker-dealers should have flexibility to meet the demand of market participants, including those who do not wish to receive consolidated data. In addition, by eliminating the mandate of an NBBO, the pricing power of nonprimary markets would diminish. Id.

74. Id. VII(B)(2)(a).

75. Id. VII(B)(2)(b); see also 17 C.FR. 240.1 lAcl-2 (2001).

76. Id. VII(C). Somewhat more tentatively, a majority also supported permitting competing consolidators with respect to options, although there was a recognition that the technological challenge of doing so would be more daunting and that it might be wiser to wait to explore this until a new model had been introduced for equities. Id. VII(E)(2).

77. Id. VII(C)(1) (footnotes omitted).

78. Id. VII(C) ("Advisory Committee members generally acknowledged that the current 'single consolidator' model has achieved the national market system goal of widespread availability of market information, and in no sense is systematically 'broken."').

79. Id. III(D)(2). 80. Id.
81. Id.

82. See infra notes 98-104.

83. Cf. supra note 60 and accompanying text.

84. ADvisoRY COMM. REPoRT, supra note 1, VII(C)(2)(c)(i). 85. See id. at apps. E-J.

86. Id. VI.

87. Id. VII(C)(2)(a) (footnotes omitted).

88. Specifically, the Advisory Committee Report explained:

The Advisory Committee believes that a competing consolidators model is technologically feasible. In reaching this conclusion, the Advisory Committee has identified four technological risks that might be heightened if that model were implemented. These risks relate to: (1) sequencing of information; (2) validation tolerances; (3) capacity; and (4) protocols/data formats. While the Advisory Committee believes these risks are manageable, it also concluded that, in reviewing any

petition to withdraw from a joint national market system Plan, or any new plan proposal, the Commission must assure that the technological considerations described below have been effectively addressed.

(i) Sequencing on Information

In a competing consolidators model, there is a risk that market data messages would be processed in different sequences by different consolidators. Multiple consolidators may very well use different hardware, software or communications platforms to process the data received from the individual exchanges. Different hardware, for example, might service market centers' input differently, which could lead to variances in the sequencing of market data in a particular security Other factors that could result in variations in sequencing among competing consolidators include message gapping, internal system software design, and the overall choice of dissemination technology. For example, one consolidator might experience message gapping in receiving a message from a market center due to a communication line problem, while the other consolidators process the messages normally There also could be variances in internal system software design that could lead to differences in processing time, which also could lead to sequencing differences among consolidators.

(ii) Validation Tolerances

The central information processors currently check all market center messages to verify that they utilize the correct message structures. If the message format is incorrect, the message will be rejected and returned to the originating market center. Information processors also calculate various information for the industry, such as the NBBO and trade summary information (e.g., high, low, and volume information), and process trade corrections. A zero quote capability is provided to eliminate stale quotes when a market center is experiencing technical difficulties. In a competing consolidator environment, standards would need to be established to verify the consistency of information, particularly with respect to mandated data such as the NBBO.

(iii) Capacity

It is critical that information processors have sufficient capacity to process the information from all reporting market centers. There are a number of elements within a consolidators design that must have sufficient capacity, including the network capacity, input and output line capacities, system capacity, internal system threading capacity, storage and memory capacity, and database size. If any one of these components cannot handle

the required capacity level, queuing will result, thereby delaying messages to the data recipients. Capacity issues, of course, exist today with the single consolidator model, but these concerns will be multiplied with competing consolidators. (iv) Protocols/Data Formats
Information processors currently receive the market centers' information utilizing standard input formats, and disseminate the consolidated data streams to the data recipients using standard output formats. In a competing consolidators model, different protocols, message formats, and technologies may be used by different consolidators, which could make the market data system more cumbersome and prone to error.

Id. VII(C)(2)(b) (footnotes omitted).

89. The Advisory Committee Report identified several specific risks that could result from the implementation of a competing consolidators' model such as duplication of the hardware, software, and personnel needed to perform consolidation of data. Id. VII(C)(2)(c)(ii). The Report emphasized:

The economic risk that engendered the most discussion, however, involves the issue of pricing power by the individual market centers. The competing consolidators would be compelled to buy data from each market center in order to fulfill their obligations under the Display Rule, leading some Advisory Committee members to believe that the model could give both the primary and secondary markets power to seek monopoly rents for their data. If this premise holds true, there could be a substantial increase in the total revenue flowing from data users to market centers.

But Advisory Committee members pointed out that countervailing forces exist to keep market

center pricing power in check. For example, some argue that market centers are constrained by their own constituents. Members of the exchanges are users of data, and would oppose excessive pricing because they have to absorb it. Public board members would have a similar influence on behalf of investors generally. And issuers over whom the exchanges compete for listings would oppose any pricing that unnecessarily reduces the general public availability of data about trading in their **shares**.
Nevertheless, some members believe these countervailing forces may be less effective with for-**profit** SROs, which will have the paramount duty of maximizing shareholder value.

In any event, the Commission would retain its backstop authority to assure that market data fees are "fair and reasonable" and "not unreasonably discriminatory" A number of Advisory Committee members believe that the potential for Commission intervention alone would deter the market centers from being overly aggressive in their pricing.

Id. (footnotes omitted).

90. See Exchange Act Release No. 43,863, 66 Fed. Reg. 8,020 (Jan. 26, 2001).
91. The Advisory Committee recognized this. ADVISORY COMm. REpoRT, supra note 1, VII(C)(2)(d).

92. Id. VII(C)(3)(e).

93. Id. VII(C)(3)(b). The Report further explained:

Small minorities favored each of the other two alternatives: retaining the current governance model, and allowing voting participation by non-SRO representatives, Those supporting the current model argue that the views of other constituencies currently are represented adequately through their

membership on SRO boards of directors and participation in the SEC's notice and comment process for Plan amendments. Those supporting voting rights for non-SRO constituencies suggest that this is the only mechanism to ensure that these constituencies' views are taken seriously.

Id. VII (C)(3)(b) n.270 (citations omitted).

94. Id. VII(C)(3)(b). There was also no consensus in favor of a weighted voting model or reducing the supermajority or unanimous vote requirements. Id.

95. Id. VII(D)(3)(c). The Advisory Committee also favored adequate public notice of the programs to help prevent unreasonable discrimination and filing of pilot programs with the Commission within a specified time period after completion. Id.

96. Id. VII(C)(3)(c).

97. Id. The Advisory Committee Report explained that the securities industry "should work cooperatively" toward four securities objectives:

Full transparency of fees, contractual terms and conditions, business requirements and administrative procedures related to the provision and use of market data;

Clear and consistent interpretations of market data policies and contractual requirements; Simplification and rationalization of market data business practices, particularly in the areas of prior-approval, user classification, unit of count, subscriber agreements, billing and reporting requirements, delayed data, and derived data; and

Utilization of the leading technology to automate all areas of market data administration.

Id.

98. See supra notes 91-95. As the Advisory Committee Report Summarized:
The Concept Release outlined a four-step approach to setting a cost-based limit on the total market information revenues of the Networks. First, each SRO would calculate the amount of its direct market information costs. These would include, for example, the Plan costs incurred by processors and administrators of the Networks in performing their Plan responsibilities and any other costs incurred only and entirely for providing market information services.

Second, each SRO would calculate a gross common cost pool made up of the total amount of its costs that are appropriately classified as contributing substantially to the value of market information. Appropriate categories of costs would include the costs of market operation and market regulation, but would not include the costs of member regulation or other direct costs of services other than market information (such as an SRO's advertising and marketing expenditures to obtain corporate listings).

Third, each SRO would apply a standard allocation percentage to its gross common cost pool to determine its net common cost pool. A percentage allocation is necessary to reflect the fact that these costs are incurred by the SROs not only to provide market information services, but also to provide listing and transaction services. The percentage would be the same for all SROs. It could be derived from the historical experience of the SROs or based on any other rationale that furthers the national market system objectives of the Exchange Act.
Finally, it would be necessary for each SRO to allocate its total cost of

market information (direct costs plus the net common cost pool) to the various Networks whose securities it trades. This allocation could be done directly (for those costs that can be associated with a particular Network), with the remainder allocated based on the proportion of the SRO's total trading volume represented by a Network's securities. The total amount of the costs allocated to each Network from the individual SROs would represent a limit on the amount of revenues that could be generated by each Network's fees. Under this conceptual approach, separate rules would govern the distribution of Network revenues, and therefore an individual SRO would not necessarily recover the amount of its total cost of market information in distributions from the Networks.

ADvISORY COMM. REPoRT, supra note 1, VII(D)(1). 99. Id. VII(D)(3).

100. Id.

101. See 6 Loss 52 SELIGMAN, supra note 20, at 2851-80.

102. For example, the Committee considered proposals to end rate discrimination by requiring a most favored nation approach under which data could be sold only on a nondiscriminatory basis at the same price to all users. ADviSORY COMM. REPORT, supra note 1, VII(D)(3).
103. See id. at ann. B.

104. See id. at app. D.

105. See NICHOLAS F BRADY ET AL., REPORT OF THE PRESIDENTIAL TASK FORCE ON MARKET MECHANISMS 55 (1988) ("IT]he markets for stocks, stock index futures, and stock options-are in fact one market. ").

106. Cf. SELIGMAN, supra note 17, chs. 10-12, (history of their earlier common consideration). 107. There are other securities market issues, for example, recent initiatives with respect to bond trading, see Exchange Act Release No. 43,873, 66 Fed. Reg. 8,131 (Jan. 29, 2001) (new bond trading system); options market structure, see Exchange Act Release No. 43,268, 73 S.E.C. Docket (CCH) 530 (Oct. 16, 2000) (settlement of SEC enforcement action), Exchange Act Release No. 43,086, 65 Fed. Reg. 48,023 (Aug. 4, 2000) (options linkage plan), and Exchange Act Release No. 43,621, 65 Fed. Reg. 75,564 (Dec. 1, 2000) (options message capacity allocation plan); or security futures products, see Commodity Futures Modernization Act of 2000, Pub. L. 106-554, 114 Stat. 2763A-365 (2000).

There are also questions concerning securities settlement that are particularly significant as the Commission moves toward next day (or T + 1) settlement. See 6 Loss & SELIGMAN, supra note 20, ch. 7(E).
Finally, there are significant issues with respect to SRO regulation that will need to be addressed.

108. See supra notes 17-20 and accompanying text.

109. For such a detailed account, see 6 Loss & SELIGMAN, supra note 20, at 2851-80.

110. See id. at 2854-60. These practices included nonrate competition through the "bundling" of ancillary services such as investor research, prohibitions on volume discounts, reciprocal trading, and service arrangements.

The most controversial of these practices during the 1960s was the give-up. Between 1964 and 1968, the amount of investment company directed give-ups effected through NYSE member firms increased more than 700%, from $11.4 million to $91.7 million, which is to say, in 1968 Exchange members gave up

to thirty-eight percent of the $243 million in commissions they received from investment companies. During those same four years, give-ups effected on regional exchanges increased 1900%, to approximately $19 million in 1968. Id.; see also INSTITUTIONAL INVESTOR STUDY REPORT OF THE SEC, H.R. Doc. No. 92-64, at 2183-92 (1971). "Give-ups and reciprocal business practices in connection with institutional trading," the SEC would report early in 1968, "have become so widespread that it may plausibly be argued that, in the case of large institutional orders, there is in economic substance no fixed minimum commission" but rather an anomaly: "Icl ompetition in the securities industry between institutional managers and brokers and between exchanges, has operated to reduce very substantially the amount of commissions actually retained by executing brokers-but with relatively little impact or effect as yet on the commissions actually paid by the public investors who invest through institutional media." Give-up Practices by Investment Companies-Changes in NYSE Commission Rate Structure, Exchange Act Release No. 8239 [1967-1969 Transfer Binder] Fed. Sec. L. Rep. (CCH) 77,523 at 83,081-82 (Jan. 26, 1968); see also SELIGMAN, supra note 15, at 397400.

111. See generally 6 Loss & SELIGMAN,rr, supra note 20, at 2881-85.

112. Between May 1, 1975 and the end of 1980, a study conducted by the Commission's Directorate of Economic and Policy Analysis calculated that commission charges computed as a percentage of the principal value of securities transactions had declined fifty-seven percent for institutional investors and twenty percent for individual investors. Even commission rates paid by individuals on orders of fewer than 200 **shares** declined six percent during this period when computed on a percentage of principal basis. 6 Loss ST SELIGMAN, supra note 20, at 2853 n.137 (citing DIRECTORATE OF ECON. & POLY ANALYSIS, SEC, STAFF REPORT ON THE SECURITIES INDUSTRY IN 1980, 83-85, 92-94, apps. Fl-F2 (1981)). The Commission estimated that, in dollars and cents terms, investor savings for the year 1976 alone had amounted to $485.3 million. SEC, FIFTH REPORT TO CONGRESS ON THE EFFECT OF THE ABSENCE OF FIXED RATES OF COMMISSIONS, at iii (1977). With the emergence of discount brokers, further commission rate savings were then anticipated. Between 1976 and the fourth quarter of 1980, the market **share** of discount brokers grew from less than 0.04% to 6.0%, with newspaper advertisements for discount brokers regularly appearing in the financial press promising rates fifty to ninety percent

less than full service brokerage houses. Id. at 48; DIRECTORATE OF ECON. & POL'Y ANALYSIS, supra, at 85-86, 102.

The profitability of the securities industry was enhanced. Between 1974 and 1980, aggregate **share** volume on national securities exchanges more than tripled. Id. at app. A-2. In 1980 the average daily NYSE **share** volume was 12.46 million **shares**. Id. Although NYSE member firms doing a public business in aggregate lost money in 1973, and barely broke even in 1974, the same firms earned average **profits** of 13.7, 14.2, 6.2, 7.7, 9.8, and 14.296 during the first six years that they were subject to negotiated rates. DIRECTORATE OF ECON. & POL'Y ANALYSIS, supra, at 27.

113. Seha M. Tinic & Richard R. West, The Securities Industry Under Negotiated Brokerage Commissions: Changes in the Structure and Performance of New York Stock Exchange Member Firms, 11 BELL J. ECON. 29, 39-40 (1980).

114. H.R. REP. No. 94-123, at 95 (1975).

115. Id.; see also S. REP. No. 94-75, at. 69-71 (1975); H. R. REP. No. 94-229, at 108 (1975); see generally 6 Loss St SELIGMAN, supra note 20, at 2885-97 (discussing section 28(e)).

116. 15 U.S.C. 78bb(e)(3) (2000). 117. S. REP. No. 94-75, at 71 (1975).

118. Id. The Commission subsequently added interpretative glosses to section 28(e). See, e.g., 6 Loss & SELIGMAN, supra note 20, at 2889-97.

119. See, e.g., D. Bruce Johnsen, Property Rights to Investment Research: The Agency Costs of Soft Dollar Brokerage, 11 YALE J. ON REG, 75 (1994); Lee A. Pickard, SEC Examines Soft Dollar Practices and Compliance by Investment Advisers, INSIGHTS, Mar. 1997, at 3; Marcia L. MacHarg & Matthew A. Chambers, SEC Issues Soft Dollar Report, INSIGHTS, Nov. 1998, at 13; Julie Allecta & Thao H. Ngo, The SEC's Soft Dollar Release, SEC. bI COMMODITIES REG., Apr. 11, 2000, at 75.

120. See, e.g., Allen Ferrell, A Proposal for Solving the "Payment for Order Flow" Problem, 74 S. CAL. L. REv. 1027 (2001); Note, The Perils of Payment for Order Flow, 107 HARV. L. REv. 1675 (1994). 121. See supra note 65.

122. See id

123. See infra note 136 and accompanying text.

124. Indeed, one leading academic has characterized payment for order flow as a "bribe." John C. Coffee, Jr., Brokers and Bribery, NY LJ., Sept. 27, 1990, at 5.

125. See Seligman, supra note 15, at 520 n. 137. The NASD's Payment for Order Flow Committee, in Inducements for Order Flow (1991), strongly argued against a prohibitory approach on the logic that cash payments for order flow were not sufficiently different from other inducements for order flow to justify separate regulation. ORDER FLOW COMM., INDUCEMENTS FOR ORDER FLOW; A REPORT TO THE NASD BOARD OF GOvERNORs 3-4 (1991), available at http://www.academic.nasdaq.com/docs/ wp91_l.pdf; Div. OF MKT. REG., SEC, MARKET 2000: AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPEMENTS 32 (1994) [hereinafter "MARKET 2000"]. The Committee, chaired by former SEC Chairman David Ruder, did endorse amendments to Rule lOb-10 to improve disclosure to customers of inducements for order flow. Id. at 30-31.

126. MARKET 2000, supra note 125, at 22.
127. Exchange Act Release No. 33,026, 58 Fed. Reg. 52,934 (Oct. 13, 1993); Exchange Act Release No. 34,902, 59 Fed. Reg. 55,006 (Nov 2, 1994).

Rule lOb-10(d)(9) defines payment for order flow to mean:

any monetary payment, service, property, or other benefit that results in remuneration, compensation, or consideration to a broker or dealer from any broker or dealer, national securities exchange, registered securities association, or exchange member in return for the routing of customer orders by such broker or dealer to any broker or dealer, national securities exchange, registered securities association, or exchange member for execution, including but not limited to: research, clearance, custody, products or services; reciprocal agreements for the provision of order flow; adjustment of a broker or dealer's unfavorable trading errors; offers to participate as underwriter in public offerings; stock loans or **shared** interest accrued thereon; discounts, rebates, or any other reductions of or credits against any fee to, or expense or other financial obligation of, the broker or dealer routing a customer order that exceeds that fee, expense or financial obligation.

17 C.ER. 240.10b-10(d)(9) (2000).

128. CBOE, AMEX Commence Programs of Payment for Options-Order Flow, 32 Sec. Reg. & L. Rep. (BNA) 941 (2000).
129. SEC, SPECIAL STUDY: PAYMENT FOR ORDER FLOW AND INTERNALIZATION IN THE OPTIONS MARKETS (Dec. 2000), available at http://www.sec.gov/news/studies/ordpayhtm.

130. Exchange Act Release No. 42,450, 65 Fed. Reg. 10,577, 10,582-83 (Feb. 28, 2000) (footnotes omitted).

On several occasions SEC Chairman Arthur Levitt expressed concern that "some of our markets are . becoming increasingly isolated from buyers and sellers in other markets." Arthur Levitt, Visible Prices, Accessible Markets, Order Interaction, Address at Northwestern University School of Law (Mar. 16, 2000), available at http://www.sec.gov/news/speech/spch355.htm; see also Arthur Levitt, Dynamic Markets, Timeless Principles, Address at Columbia Law School (Sept. 23, 1999), available at http:// www.sec.gov/news/speech/speecharchive/1999/spch295.htm [hereinafter Levitt, Dynamic Markets, Timeless Prinicples]; Arthur Levitt, Best Execution: Promise of Integrity, Guardian of Competition, Address at the Securities Industry Association Meeting, Boca Raton, Fla. (Nov. 4, 1999), available at http://www.sec.gov/news/speech/speecharchive/1999/spch315.htm; Arthur Levitt, The National Market System: A Vision That Endures, Address at Stanford University (Jan. 8, 2001), available at http:// www.sec.gov./news/speech/spch453.htm.
131. MARKET 2000, supra note 125, at 32.

132. SuperDot began in 1976 as the Designated Order Turnaround (DOT) system, a small order execution system for orders up to 199 **shares**. Div. OF MKT. REG., SEC, THE OCTOBER 1987 MARKET BREAK 7-17 n.52 (1988) [hereinafter OCTOBER MARKET BREAK].

By 2000, the NYSE had integrated SuperDot into a broader order transmission system that its 2000 Fact Book described in these terms:

Orders are sent to the NYSE from member firms through the Exchange's order delivery System SuperDot and through the Exchange's order management system BBSS (Broker Booth Support System). Orders can be routed to the specialist's Display Book or to the broker's BBSS terminals at the Booth. The vast majority of orders, representing about 57.7% of the volume, are routed directly to the Specialist. Larger sized orders are handled by BBSS and brokers. In addition, orders requiring special handling are phoned to the trading floor for broker handling.

Brokers now have access to a variety of technology tools to help in the communication and execution of orders on the trading floor, including: pagers, cell phones, broker-to-broker booth phones, and most recently, e-broker handheld computers. These e-broker handhelds provide a fast, efficient mechanism to receive orders, send reports and transmit messages to booths. Through automatic routing controls brokers can receive orders in the trading crowd directly from a member firm trading desk and immediately report back execution details. Linkage of the BBSS and e-brokers to the Exchange's On-Line Comparison system provides real time submission to comparison to member firms wishing to exercise this option.

During 2000, SuperDot processed an average of 1,556,750 orders per day for a year-end total of 258 subscribers.... SuperDot volume of 261.1 billion **shares** in 2000 exceeded all prior activity records. The NYSE has doubled the capacity of the system to provide the order processing capability to now handle 2,000 messages per second, queuing.

NYSE, FACT BOOK 2000 23 (2000), available at

http://www.nyse.com/about/factbook.html.

For further discussion of SuperDot, see 5 Loss br SELIGMAN, supra note 31, 2583-90. The most significant application of SuperDot is with market and limit orders. SuperDot permits a broker or the trading room of a broker-dealer firm to transmit an order electronically to the specialist's post on the NYSE floor. There the specialist announces market orders to the "crowd" of floor brokers in front of the specialist's post. Either a floor broker, the specialist, or the specialist's book will be the contra party to the trade. A report of the order execution is then returned to the broker or trading room over the same electronic circuit that originally brought the order.

There are several advantages to any order execution system including SuperDot. Order routing systems eliminate the costs of a floor broker and reduce error costs in securities transactions. Rather than having to rely on human intermediaries to transfer an order from a broker to a trading room to a floor broker to a specialist and so on. An order routing system permits a direct electronic link to the specialist post. This is particularly advantageous after the order has been executed. An order routing system not only returns electronically a confirmation of a trade to a broker, but also reports electronically the trade to SIAC on behalf of the broker in order to start the settlement process and to the CTA for last sale reporting. An order routing system also allows a broker to secure for customers a price superior to the quoted price by delivering the order to the crowd of floor brokers in front of a specialist's post. In 1993, the Commission calculated that 22.2% of a sample of trades were within the NYSE's best bid/offer. MARKET 2000, supra note 125, at 39. From the point of view of the NYSE, this is a key virtue of SuperDot. SuperDot preserves a role for floor brokers even though it eliminated the floor broker's opportunity to serve as messengers of orders from off-the-floor trading rooms to the specialist posts.

133. 5 Loss ST SELIGMAN, supra note 31, at 2589-91 & n.233 (describing American, Boston, Chicago, Cincinnati, Pacific, and Philadelphia stock exchange electronic order routing systems).

134. See generally id. at 2590-95 (regarding ITS).

135. In fact, in the Nasdaq SuperMontage system, non-directed orders essentially are handled through such a one-step process. See Exchange Act Release No. 43,863, 66 Fed. Reg. 8,020 (Jan. 26, 2001).

136. 5 Loss & SELIGMAN, supra note 31, at 2511-12 n.64 (citing Letter from the NYSE to George Fitzsimmons, Secretary (Aug. 4, 1978)) (citations omitted). For the history of the various unsuccessful CLOB proposals, see id.

137. In 2000, the Commission approved a rule change to permit Electronic Communication Networks (ECNs) and Alternative Trading Systems (ATSs) to participate through an interface in the ITS. Exchange Act Release No. 42,536, 65 Fed. Reg. 15,401 (Mar. 22, 2000).

138. Richard E. Austin, Driving Force: As Big Board President, John J Phelan Pushes Changes in Wall Street, WALL ST. J., Sept. 2, 1980, at 1.

139. 5 Loss & SELIGMAN, supra note 31, at 2594 (citing SEC, A REPORT ON THE OPERATION OF THE INTERMARKET TRADING SYSTEM 1978-1982, 48-49 (1982)). 140. See Securities Exchange Act Release No. 19,456, 48 Fed. Reg. 4,938, 4,940 (Feb. 3, 1983). 141. OCTOBER MARKET BREAK, supra note 24, at 7-48.

142. Id.

143. See Levitt, Dynamic Markets, Timeless Principles, supra note 130.

In the listed market, traditional structures like the archaic Intermarket Trading System must not bar participation by ECNs that remain broker-dealers. If ITS is to remain the primary linkage between exchanges, it must no longer block innovation in its participants' markets and create inordinate delays for entry. It should not prevent, as it currently does, efficient electronic routing to other markets. ECNs simply must be able to compete With traditional exchanges and dealer markets in an environment free from unfair advantages or unreasonable barriers.

144. Id.; NYSE SPECIAL COMM. ON MKT. STRUCTURE, GOVERNANCE St OWNERSHIP, MARKET STRUCTURE REPORT 41-44 (2000).

145. Exchange Act Release No. 44,568, 66 Fed. Reg. 38,390 n.3 (July 24, 2001) (describing a NASDAQ decimalization study that reported that effective quote spreads had fallen by about fifty percent).

146. Exchange Act Release No. 44,399, 66 Fed. Reg. 32,654 (June 15, 2001) (SEC approval of new SuperDot order size).

147. See 5 Loss & SELIGMAN, supra note 31, at 2525-28.

The hallmark of a stock exchange historically has been the centralization of trading on an exchange floor. Wherever trading originates the ultimate execution of an order will usually occur at a specialist's post on the floor of a stock exchange . . .

Regardless of where an order originated, it was usually communicated to the specialist in that stock on an exchange floor. Before the order process was automated, a "market order" (an order to execute at the market price) was usually routed to the specialist in the following way A customer would telephone a broker and ask the broker to buy or sell a given number of **shares** in a stock traded on a particular exchange. The broker then would write out an order form and forward the order to be telephoned or wired to the trading room of the broker's firm, usually located in New York City The trading room would forward the order to a booth near the floor of the appropriate exchange, where it would he picked up by a floor broker. The floor broker then would physically carry the order to the specialist's post. If trading in the stock was sufficiently active, the floor broker could execute the order by matching it against the reciprocal order of another floor broker who was standing in the "crowd" in front of the specialist's post, or against a reciprocal order that had been left with the specialist by another floor broker. Alternatively the order could be left with the specialist and the size and price of the order written in the specialist's "book." When buy and sell orders could not be matched, the specialist was obligated to function as a dealer and to buy or sell sufficient stock to ensure an orderly and continuous market.

Similarly a customer could have forwarded a "limit order" (an order that permits the customer

to set a specific price above or below which the security must be sold or bought) or a "stop order" (which requires a specialist to execute an order when a transaction in the security occurs at or about the "stop" price in the order). Again the broker would route the order to the trading room, which would forward it to a floor broker, who would carry it to the . . . "specialist's book." The orders in the book would be executed when the market price rose or fell to the price designated in the limit or stop order.

Id. (footnotes omitted). 148. Id. at 2529-32.

As of 1998 the NYSE was responsible for 88% of the dollar value of the stocks traded on exchanges and 87% of the **shares** traded. [SEC Ann. Rep. 192-93 (1999).] ...
Long the second largest exchange in terms of value of stock listed was the American Stock Exchange (AMEX). In 1998 the dollar value of all stocks listed on the AMEX was $152.3 billion, or 1.4 % of the then $10,864 billion of stocks listed on the NYSE. [NYSE 1999 SECURITIES INDUSTRY FACT BOOK 48 (1999).] ...

There are six other exchanges, euphemistically known as the "regional exchanges." [In the aggregate, the six regional exchanges were responsible in 1998 for less than one percent of the aggregate capitalization of all listed companies and approximately ten percent of the consolidated tape volume in NYSE listed stocks. SEC Ann. Rep. 192, 195 (1999).] Virtually all of this trading occurred on five regional exchanges: Boston, Cincinnati, Chicago, Pacific, and Philadelphia. On these five regional exchanges, over half of the trading occurred on the Chicago Stock Exchange, which in recent years has eclipsed the AMEX in **share** volume and dollar volume, and is now second to the NYSE among stock exchanges. Most trading on the regional exchanges is dually listed or unlisted trading.

5 Loss & SELIGMAN, supra note 31, at 2529-31 (footnotes omitted).

149. All stocks not trading on a stock exchange trade in the over-the-counter (OTC) market. There is no undistributed middle here. In section 15 of the Securities Exchange Act of 1934, instead of trying to define the term, Congress initially referred simply to any transaction "otherwise than on a national securities exchange." 15 U.S.C. 78o(c)(1)(A) (2000). Several distinct types of securities trading occur within the OTC market, ranging from U.S. Treasury bonds and notes to corporate bonds to stock. As distinguished from the stock exchanges, OTC trading is not centralized on a discrete number of floors. Instead, OTC dealers may become market makers in a security primarily by signifying an intent to deal in that security

An OTC dealer need not purchase a seat on an exchange. OTC dealers, in a quite literal sense, were long unified only by a "nationwide web of telephone and telegraph wires." SELIGMAN, supra note 17, at 141. For a discussion regarding the pre-Nasdaq history of OTC trading, see id. at 140-44, 183-89, 490; Michael J. Simon & Robert L.D. Colby, The National Market System for Over-the-Counter Stocks, 55 GEO. WASH. L. REv. 17, 19-34 (1986).

Before February 1971 quotations in over-the-counter stocks were reported exclusively in daily "pink sheets" published by the National Quotations Bureau, a private business corporation, listing bid and ask prices of each dealer in each stock for the previous trading day. To obtain up to the minute competitive quotations, a stockbroker or dealer had to telephone one or more dealers in an over-the-counter security ... [This] discouraged brokers or dealers placing orders from engaging in rigorous comparative shopping.
5 Loss & SELIGMAN, supra note 31, at 2605-06; see also id. at 2609 (Today "[t]here are two basic NASDAQ securities markets. The NASDAQ SmallCap Market lists small to medium sized companies; the NASDAQ National Market lists larger companies with higher capitalization."); id. at 2607-12 (discussing NASDAQ listing standards).

150. MARKET 2000, supra note 125, at app. A IV-1; see also Therese H. Maynard, What Is an "Exchange?"-Proprietary Electronic Securities Trading Systems and the Statutory Definition of an Exchange, 49 WASH. dT LEE L.

REv. 833 (1992); Polly Nyquist, Failure to Engage: The Regulation of Proprietary Trading Systems, 13 YALE L. & POLY REv. 281, 299-300 (1995).

151. Securities Exchange Act section 3(a)(1) defines an exchange to mean:

any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

15 U.S.C. 78c(a)(1) (2000).
152. The term facility is specifically limited in the 1934 Act by the introductory phrase, "when used with respect to an exchange," and includes

its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

Id. 78c(a)(2).

153. Section 3(a)(3)(A) of the Securities Exchange Act defines "member" of a registered national securities exchange to mean:

(i) any natural person permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, (ii) any registered broker or dealer with which such a natural person is associated, (iii) any registered broker or dealer permitted to designate as a representative such a natural person, and (iv) any other registered broker or dealer which agrees to be regulated by such exchange and with respect to which the exchange undertakes to enforce compliance with [its rules and the federal securities laws].
Id. 78c(a)(3)(A).

154. See 6 Loss & SELIGMAN, supra note 20, at 2659-64.

It is not inevitable that proprietary trading systems be outside the definition of an exchange. When 33(a)(1) defines an exchange, among other things to provide "facilities for bringing together purchasers and sellers of securities . . . " that language suggests that these systems might, in fact, be within the scope of the definition. However, 33(a)(1) promptly cuts the other way when it continues, "or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood ...... Since this Section was enacted in 1934 and has not been subsequently amended, the "general understanding" may be somewhat dated today.

Id. at 2662-63 (footnote omitted).

155. Exchange Act Release No. 35,124, 59 Fed. Reg. 66,702 (Dec. 28, 1994) (codified at 17 C.FR. pts. 240, 249) (adoption of former Rule 17a-23(b)(2)); Exchange Act Release No. 40,760, 63 Fed. Reg. 70,844 (Dec. 22, 1998) (codified at 17 C.ER. pts. 202, 240, 242, 249) (rescission of Rule 17a23 and adoption of Regulation ATS).

156. Exchange Act Release No. 39,884, 63 Fed. Reg. 23,504 (Apr. 29, 1998); see Exchange Act Release No. 40,760, 63 Fed. Reg. at 70,844 (adoption of regulation ATS). In 1997, the Commission had solicited comment on a broad range of questions concerning the oversight of alternative trading systems. Exchange Act Release No. 38,672, 62 Fed. Reg. 30,485 (June 4, 1997); see generally Mark Klock, The SEC's New Regulation ATS: Placing the Myth of Market Fragmentation Ahead of Economic Theory and Evidence, 51 FLA. L. REv. 753 (1999); Jonathan R. Macey & Maureen O'Hara, Regulating Exchanges and Alternative Trading Systems: A Law and Economics Perspective, 28 J. LEGAL STUD. 17 (1999).

157. Exchange Act Release No. 40,760, 63 Fed. Reg. at 70,859.

158. Id. at 70,847.

159. Id. at 70,859

160. 17 C.F.R. sec 240.3al-1 (2001).

161. Exchange Act Release No. 40,760, 63 Fed. Reg. at 70,859 (footnote omitted).

162. 17 C.ER. 242.301(b) (2001). To allow new ATSs to start, without disproportionate burdens, an ATS with less than five percent of trading volume in all securities it trades is only required to: (i) file with the Commission a notice of operation on Form ATS under Rule 301(b)(2) and quarterly reports on Form ATS-R under Rule 301(b)(9); (ii) maintain records, including an audit trail of transactions as specified in Rules 301(b)(8), 302, and 303; and (iii) refrain from using the words "exchange," "stock market," or similar terms in its name as required by Rule 301(b)(11). Id. 242.301-.303.

An ATS which during at least four of the preceding six calendar months had an average daily volume of five percent or more of the aggregate average daily **share** volume for a covered security is required to provide quotation data to a relevant national securities exchange in compliance with Rule llAcl1. Id. 240.1 lAcl-1.

An ATS, with limited exceptions, that has twenty percent or more of the average daily volume in a covered security has additional responsibility under Rule 301(b). Id. 242.301(b)(5).

163. Under the Securities Acts Amendments of 1975, an exchange may be registered in compliance with sections 6 and 19(a) of the Exchange Act by filing an application with the Commission on Form 1. See 6 Loss & SELIGMAN, supra note 20, at 2654-57.

164. 17 C.ER. 240.116-l(a)(2)(iii) (2001); see 5 Loss& SELIGMAN, supra note 31, at 2533-51. 165. 5 Loss & SELIGMAN, supra note 31, at 2635-47. 166. Exchange Act Release No. 42,758,65 Fed. Reg. 30,175,30,177-78 (May 10, 2001) (footnotes omitted).

167. Exchange Act Release No. 43,084, 65 Fed. Reg. 48,406 (Aug. 8, 2000); Exchange Act Release No. 43,590, 65 Fed. Reg. 75,414 (Dec. 1, 2000).

Rule 1 lAc 1-5 requires market centers (including exchange specialist, OTC market maker, or alternative trading system) to make available monthly reports of statistical information concerning order execution. 17 C.ER. 240.11Ac1-5 (2001).

Rule 1 lAcI-6 requires each broker-dealer to make a quarterly report of its routing of nondirected orders in covered securities. The report separately

treats stock (i) listed on the NYSE; (ii) qualified on the NASDAQ; (iii) listed on the AMEX or other securities exchange; and (iv) options contracts. Id. 240.11Acl-6.

168. Exchange Act Release No. 43,590, 65 Fed. Reg. 75,414 (Dec. 1, 2000):

In considering the issue of fragmentation, the overriding objective of the Commission's inquiry has been quite pragmatic-to assure that investors receive the best possible prices for their orders. For example, do investors who seek liquidity by submitting market orders pay the lowest possible effective spread, or liquidity premium, for their orders? Similarly, do investors who supply liquidity by submitting limit orders have the best possible opportunity for their orders to be executed? The Commission believes that vigorous competition among buyers and sellers in an individual security, particularly through an opportunity for their orders to interact directly, is the only reliable means to achieve the best prices for investors. To the extent that substantial fragmentation of order flow stands in the way of such competition, the harm that results is not merely theoretical. Rather, investors are forced to incur higher transaction costs, and the efficiency of the U.S. markets is diminished....

Determining how best to assure an appropriate balance between market center competition and order interaction is unquestionably a difficult task. Nevertheless, the Commission's year-long inquiry has led it to conclude that increased public disclosure of execution quality and order routing practices is a minimum step necessary to address fragmentation.

Id. at 75,415 (footnotes omitted).

169. In recent years the Commission has focused short reports on relevant issues. See, e.g., SEC, SPECIAL STUDY: ON-LINE BROKERAGE: KEEPING APACE OF CYBERSPACE (1999), available at http:// www.sec.gov/news/studies/cyberspace.htm.

170. The most thoughtful conclusions of the Advisory Committee on Market Information occurred after detailed presentations concerning technological issues. See supra note 77.

171. 5 Loss ST SELIGMAN, supra note 31, at 2489-91.

172. Louis Loss di JOEL SELIGMAN, SECURITIES REGULATION 253-88 (3d ed. Supp. 2002). 173. See supra notes 105-68.

174. 7 Louis LOSS SI &JOEL SELIGMAN, SECURITIEs REGULATION 3198-3221 (3d ed. 1991). 175. 5 Loss EI SELIGMAN, supra note 31, at 2542-51.

176. See SELIGMAN, supra note 17, at 189-97 (Douglas' direction of SEC Protective Committee Study).

177. 1 Louis Loss &JOEL SELIGMAN, SECURITiEs REGULATION 450-63 (3d ed. 1998) (Wheat Committee Report).

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TECHNET SAYS U.S. SHOULD MAKE BROADBAND PROMOTION TOP PRIORITY.

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Federal, state and local govts. need to make broadband rollout top priority, Silicon Valley advocacy group TechNet said Tues., and that means facilities-based telecom competition. "It's all about how to encourage competition in the last mile," said Microsoft COO Robert Herbold, member of TechNet's broadband working group and also of President Bush's Council of Advisers on Science & Technology (PCAST). TechNet Pres. Rick White, former Democrat on House Telecom Subcommittee, said TechNet "would encourage opening the local loop as much as possible." However, in its White Paper A National Imperative: Universal Availability of Broadband by 2010, TechNet said FCC shouldn't mandate open access for cable broadband networks. Group declined to take position on Bell-friendly bill sponsored by House Commerce Committee Chmn. Tauzin (R-La.) and ranking Democrat Dingell (Mich.), which many Tauzin-Dingell opponents hailed as victory in that TechNet didn't actually endorse controversial legislation.

In not taking position on Tauzin-Dingell, White explained that TechNet was trying to "avoid those lower-level issues... our focus was to take a longer term view." It was very long view, with group calling for 100 million U.S. homes to be receiving broadband of 100 Mbps by 2010. "Today, virtually no American homes have connections with such bandwidth," TechNet said. Only 4.4% of U.S. households currently subscribe to broadband service, TechNet estimated, "typically at speeds of only 400 kbps or less." To make leap it proposed in mere 8 years, TechNet outlined series of policy proposals that would discourage local communities from exercising broad **discretion** in enforcing rights-of-way, encourage private **investment** in broadband and remain technology-neutral. "We're calling on President Bush... and both houses of Congress to make broadband a national priority," White said.

TechNet set interim goal of at least 50% of households passed by 2 or more broadband providers with at least 6 Mbps access, suitable for DVD-quality video. "That's about as much as you can hope to coax out of

existing technology," White said. Current broadband uses "technology that is jury- rigged from old technology," he said: "It doesn't perform too well." TechNet's vision for 2010 involves new telecom facilities' being constructed, both fiber and wireless. Excite@Home Chief Technology Officer Milo Medin, another TechNet broadband representative, said focus of federal and local policymakers should be on "real competition, facilities-based."

Recurring theme in TechNet's broadband group was restrictive nature of many local govts. in protecting rights- of-way. "A broadband network requires backhoes and trenching," Doerr said: "There's enormous frustration with the thicket of overlapping authorities." He and other TechNet officials said focus of local govt. should not be to make money on initial use of right-of-way but from increase in tax revenue that would come from broadband's stimulation of local economy. State regulation, report said, "too often... results in excessive fees, including exorbitant yearly per-foot charges, or fees based on a percentage of a provider's gross income." TechNet said: "Congress and state governments should enact legislation that limits the ability of local governments to impose conditions and excessive fees unrelated to the use of public rights of way." Group plans to create National Broadband Index to chart how open communities across the U.S. are to broadband deployment.

Federal govt. should allocate 200 MHz of spectrum for wireless broadband from govt. to private-sector use, with **proceeds** from auctions going to fund costs of moving existing users, TechNet said. In addition, "a national spectrum policy should be established, relying on flexible, market- oriented spectrum allocation and usage." TechNet also addressed so-called digital divide, saying tax credits and other incentives could help motivate private sector to serve 10-15% of American homes that are in underserved areas and wouldn't otherwise be targeted by deployers.

Lack of "killer app" for broadband did not escape TechNet, as it acknowledged that take rate was low even in well-to-do areas passed by multiple providers. Doerr said Napster showed there was large demand for content online, but said in dealing with intellectual property "I think we've swung from one extreme to another." TechNet called on industry to resolve dilemma of digital rights management, but didn't call for govt. intervention.

Infrastructure creation envisioned by TechNet would cost billions of dollars, members acknowledged. But Doerr said venture funding would be there, despite collapse of so many competitive providers in last year. "The failure we've seen in telecom is one of overcapitalization and the construction of redundant backbone," he said. Construction of last-mile approaches to home would certainly find funding, he predicted. Bottom line, for money to flow from private sector, regulatory landscape has to be clear, Doerr said: "Good government means regulatory certainty."

Other advocacy groups and companies praised TechNet report and took opportunity to promote their own broadband solutions. ALTS Pres. John Windhausen praised TechNet's acknowledgment of need for "new entrants" to "drive the deployment of broadband technologies." Alliance for Public Technology Pres. Paul Schroeder said Sec. 706 explicitly called for advanced telecom services to be deployed in timely fashion and should be top priority of govt. Computing Technology Industry Assn. (CompTIA) Mgr.-Public Policy Thomas Santaniello echoed TechNet's call for tax incentives for broadband in rural areas. AT&T Vp-Law Len Cali said the company **shared** TechNet's technology-neutral focus and emphasis on rights-of-way, adding: "We strongly agree that an open, competitive marketplace would best address the concerns of price, content and deployment that TechNet identifies." American ISP Assn. Pres. Sue Ashdown said ISPs were ready to compete in fair marketplace "and will work with Congress and the administration to ensure that high-speed Internet service is affordable, reliable and available to all Americans." -- Patrick Ross

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Pilgrim Prime Rate Trust (NYSE:PPR), a diversified closed-end management investment company listed on the New York Stock Exchange, declared a 4.20 cents per **share** monthly dividend on December 21, 2001 for the 31 days of December, payable on January 11, 2002 to shareholders of record on December 31, 2001. This represents the 164th consecutive monthly dividend since the Trust's inception in May 1988.

The following are annualized distribution rate calculations based on the declared dividend for the month, Net Asset Value ("NAV") at month-end and the month-end NYSE composite closing price ("Market").

Annualized Period-end Distribution Rates	DIVIDEND	NAV	MARKET
December 21, 2001	$ .042	6.82%	7.45%
November 30, 2001	$ .043	7.16%	7.94%
October 31, 2001	$ .047	7.65%	8.49%
September 30, 2001	$ .047	7.61%	8.25%
August 31, 2001	$ .052	7.96%	8.11%
July 31, 2001	$ .054	8.19%	8.43%
June 30, 2001	$ .054	8.42%	8.57%
May 31, 2001	$ .058	8.71%	8.85%
April 30, 2001	$ .060	9.30%	9.38%
March 31, 2001	$ .065	9.65%	9.66%
February 28, 2001	$ .062	9.99%	9.95%
January 31, 2001	$ .070	10.20%	9.95%

Pilgrim Prime Rate Trust was the first fund to invest in a portfolio of senior secured floating rate bank loans. The Trust seeks to provide as high a level of current income as is consistent with the preservation of

capital.

The Trust is managed by ING Pilgrim Investments, LLC, and distributed by ING Pilgrim Securities, Inc. ING Pilgrim companies are indirect, wholly-owned subsidiaries of Amsterdam-based ING Group N.V. (NYSE:ING), one of the world's leading financial services companies with operations in over 65 countries. ING Pilgrim's operations are based in Scottsdale, Arizona.

Distribution Rates are calculated by annualizing dividends declared during the period (i.e., divide the monthly dividend amount by the number of days in the related month and multiply by the number of days in the fiscal year) and then dividing the resulting annualized dividend by the month-ending NAV (in the case of NAV) or the month-end closing price on the NYSE composite (in the case of Market). The distribution rate is based solely on actual dividends and distributions, which are made at the **discretion** of management. The distribution rate may or may not include all **investment** income, and ordinarily will not include capital **gains**.

Past performance is no assurance of future results. Investment return and principal value of an investment in the Trust will fluctuate. **Shares**, when sold, may be worth more or less than their original cost. The loans in which the Trust invests are subject to credit risks and the potential for non-payment of scheduled principal or interest payments which may result in a reduction of the Trust's NAV.

For more complete information about the Trust, contact Pilgrim Prime Rate Trust at the address above to request a prospectus which contains more complete information on all charges, fees and expenses. Please read the prospectus carefully before investing or sending money.

If you would like to receive this press release via email, please contact Stacey Parker at sparker@pilgrimfunds.com.

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